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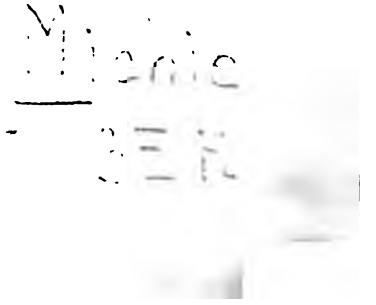

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ANNOTATED.

A COLLECTION OF ALL

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DECIDED BY THE COURTS OF
LAST RESORT

IN THE

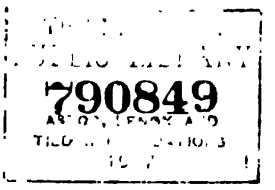
UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

VOLUME VI.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VIRGINIA.
1902.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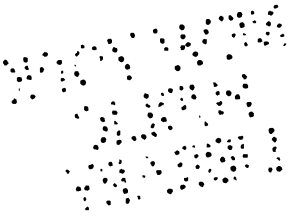

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MUNICIPAL CORPORATION CASES.

VOLUME VI.

MARGARET FRENCH and Others, Plffs. in Err., *v.* BARBER ASPHALT PAVING COMPANY.

(*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 625.]

Constitutional Law—Local Assessments—Front-Foot Rule.*—The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking of property without due process of law.

In Error to the Supreme Court of the State of Missouri to review a decision affirming a judgment for plaintiff in an action to enforce the lien of a tax bill for the cost of paving. Affirmed.

See same case below, 58 S. W. 934.

Statement by MR. JUSTICE SHIRAS:

This was a suit instituted in the circuit court of Jackson county, Missouri, by the Barber Asphalt Paving Company, a corporation whose business it was to construct pavements composed of asphalt, against Margaret French and others, owners of lots abutting on Forest avenue in Kansas City, for the purpose of enforcing the lien of a tax bill issued by that city in part payment of the cost of paving said avenue.

The work was done comformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of the city declaring the work of paving the street, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the owners of a majority of front feet on that part of the street to be improved had the right, under the charter, within thirty days after the first day of the publication of the resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby to devest the common council of the power to make the improvement, and such property owners had the right by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this instance neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public

*See note at end of case.

works, enacted an ordinance requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and the plaintiff company being the lowest and best bidder therefor, a contract was, on July 31, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement.

The contract expressly provided that the work should be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city should not in any event be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of land abutting on the improvement. The charge against each lot or tract of land was evidenced by a tax bill. The tax bill representing the assessment against each lot was, by the charter, made a lien upon the tract of land against which it was issued, and was prima facie evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction, against the owners of the land charged. No personal judgment was authorized to be rendered against the owner of the land. The right was expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workman-like manner.

The defendants pleaded and contended that the contract offered in evidence was a contract to construct the pavement and maintain and keep the street in repair for five years, and was contrary to the charter of Kansas City, void, and of no effect; and that the charter of Kansas City purports to authorize the paving of streets and to authorize special tax bills therefor, charging the cost thereof on the abutting property according to the frontage, without reference to any benefits to the property on which the charge was made and the special tax bills levied, and that such method of apportioning and charging the cost of the pavement was contrary to and in violation of the 14th Amendment to the Constitution of the United States.

The judgment of the circuit court of Jackson county was for the plaintiff company for the amount due on the tax bill, and for the enforcement of the lien. From this judgment an appeal was taken to the supreme court of Missouri, and on November 13, 1900, the judgment of the circuit court was affirmed, and thereupon a writ of error from this court was allowed.

Mr. Henry N. Ess for plaintiffs in error.

Messrs. Wm. C. Scarritt, Edward L. Scarritt, John K. Griffith, and Elliott H. Jones for defendant in error.

French *v.* Barber Asphalt Pav. Co

MR. JUSTICE SHIRAS delivered the opinion of the court:

In its opinion in this case the supreme court of Missouri said that "the method adopted in the charter and ordinance of Kansas City, of charging the cost of paving Forest avenue against the adjoining lots according to their frontage, had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. St. Louis use of Seibert v. Allen, 53 Mo. 44; St. Joseph v. Anthony, 30 Mo. 538; Neenan v. Smith, 50 Mo. 528; Kiley v. Cranor, 51 Mo. 541; Rutherford v. Hamilton, 97 Mo. 543, 11 S. W. 249; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014; Farrar v. St. Louis, 80 Mo. 379.

"In the last-mentioned case Judge Norton for the court said:

" 'The liability of lots fronting on a street, the paving of which is authorized, to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the "foot-front rule." '

"Learned counsel for defendant concede such was the state of the decided law of this state, and that the portion of the Kansas City charter known as the 9th article of the charter, which authorizes the cost of a pavement to be assessed against the lots fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed similar laws and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court."

Accordingly, the supreme court of Missouri held that the assessment in question was valid, and the tax imposed collectible. And, in so far as the Constitution and laws of Missouri are concerned, this court is, of course, bound by that decision.

But that court also held, against the contention of the lot owners, that the provisions of the 14th Amendment to the Constitution of the United States were not applicable in the case; and our jurisdiction enables us to inquire whether the supreme court of Missouri were in error in so holding.

The question thus raised has been so often and so carefully discussed, both in the decisions of this court and of the state courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing power, nor to attempt to discover and define the limitations upon that power that may be found in constitutional principles. It will be sufficient for our present purpose to collate our previous decisions, and to apply the conclusions reached therein to the present case.

It may prevent confusion and relieve from repetition if we

point out that some of our cases arose under the provisions of the 5th, and others under those of the 14th, Amendments to the Constitution of the United States. While the language of those amendments is the same, yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper. Slaughter-House Cases, 16 Wall. 36, 77, 80, 21 L. Ed. 394, 409.

Thus it was said, in Davidson v. New Orleans, 96 U. S. 97–103, 24 L. Ed. 616-619:

"It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the 14th Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

However, we shall not attempt to define what it is for a state to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, but shall proceed, in the present case, on the assumption that the legal import of the phrase "due process of law" is the same in both amendments. Certainly, it cannot be supposed that by the 14th Amendment it was intended to impose on the states, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government, in a similar exercise of power, by the 5th Amendment.

Let us, then, inquire as briefly as possible what has been decided by this court as to the scope and effect of the phrase "due process of law," as applied to legislative power.

One of the earliest cases in which was examined the historical and legal meaning of those words is Den ex dem. Murray v.

Hoboken Land & Improv. Co. 18 How. 272, 15 L. Ed. 372. The question involved was the validity of a sale of real estate made under a distress warrant, authorized by a statute of the United States (3 Stat. at L. 592, chap. 107), against a defaulting collector of customs. It was contended that such a proceeding deprived the owner of property without due process of law, contrary to the 5th Amendment; that by "process of law" was meant a charge, defense, judgment before and by a legally constituted court. The question was thus stated by Mr. Justice Curtis:

"That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Pursuing the lines of inquiry thus indicated, the court reached the conclusions that, in ascertaining and enforcing payment of taxes and of balances due from receivers of the revenue in England, the methods have varied widely from the usual course of the common law on other subjects, and that, as respects such debts, the "law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of examination bearing a very close resemblance to the warrant of distress in the act of Congress in question; that this diversity in the law of the land between revenue defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states after the Declaration of Independence and before the formation of the Constitution of the United States; that not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was

committed the power to ascertain the amount of the default, and by such warrant proceed to collect it; and that, accordingly, the distress warrant in question was not inconsistent with that part of the Constitution which prohibits a citizen from being deprived of his property without due process of law.

In Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678, there was presented the question whether the 14th Amendment availed to secure to a citizen of Louisiana a right of trial by jury as against an act of that state which provided that in certain circumstances a case enforcing penalties should be tried by the judge; and it was held that "the states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship which the states are forbidden by the 14th Amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How. 280, 15 L. Ed. 376. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof, —or with any treaty made under the authority of the United States. . . . Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

McMillen v. Anderson, 95 U. S. 37, 41, 24 L. Ed. 335, was a case wherein was involved the validity of a law of the state of Louisiana, whereby a tax collector was authorized to seize property and sell it in order to enforce payment of a license tax, and which was alleged to be opposed to the provision of the 14th Amendment of the Constitution, which declares that no state shall deprive any person of life, liberty, or property without due process of law; but it was said by this court:

"Looking at the Louisiana statute here assailed, . . . we feel bound to say that, if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing taxes in the states, by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary or unequal or illegal. It must, under our Constitution, be lawfully done. But that

does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that when any person shall refuse or fail to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment, and the manner of giving this notice is fully prescribed. If at the expiration of this time the license 'be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property' of the delinquent, or so much as may be necessary to pay the tax and costs. . . . Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, was a case wherein an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted in the state courts, and was by writ of error brought to this court on the ground that the proceeding deprived the owner of his property without due process of law. The origin and history of this provision of the Constitution, as found in Magna Charta and in the 5th and 14th Amendments to the Constitution, were again considered; the cases of Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, 15 L. Ed. 372, and McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335, were cited and approved; and it was held that "neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution."

In Springer v. United States, 102 U. S. 586, 26 L. Ed. 253, was involved the validity of an act of Congress, June 30, 1864 (13 Stat. at L. 218, chap. 172), whereby lands of A were distrained and sold by reason of his refusal to pay a tax

assessed against him; and it was contended that the sale of defendant's real estate, to satisfy the tax assessed upon him, in a summary manner, without first having obtained a judgment in a court of law, was a proceeding to deprive the defendant of his property without due process of law; that by "due process of law" is meant law in its regular course of administration by the courts of justice, and not the execution of a power vested in ministerial officers. But this court, after citing Den ex dem. Murray v. Hoboken Land & Improv. Co. as holding that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid, and that the proceeding was "due process of law," said:

"The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

In Missouri v. Lewis, 101 U. S. 22, sub nom. Bowman v. Lewis, 25 L. Ed. 989, the 14th Amendment was invoked to invalidate legislation of the state of Missouri regulating the right of appeal and of writs of error, and whereby suitors in the courts of St. Louis and certain other named counties were denied the right of appeal to the supreme court of Missouri in cases where it gave that right to suitors in the courts of the other counties of the state. Speaking for the court Mr. Justice Bradley said:

"If this position is correct, the 14th Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only $5 could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

"If, however, we take into view the general objects and purposes of the 14th Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal pro-

tection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. . . . Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. . . . If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line."

In Mattingly v. District of Columbia, 97 U. S. 687, 692, 24 L. Ed. 1098, 1100, there was called in question the validity of the act of Congress of June 19, 1878 (20 Stat. at L. 166, chap. 309), entitled "An Act to Provide for the Revision and Correction of Assessments for Special Improvements in the District of Columbia and for Other Purposes," and it was said by this court, through Mr. Justice Strong: "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question."

In Kelly v. Pittsburg, 104 U. S. 78, 26 L. Ed. 658, it was urged that land which the owner has not laid off into town lots, but occupied for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city,—the water tax, the gas tax, the street tax, and others of similar character. The reason for this was said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they chose, while he reaps no such benefit. Cases were cited from the higher courts of Kentucky and Iowa where this principle was asserted, and where those courts have held that farm lands in the city are not subject to the ordinary city taxes. But this court said:

"It is no part of our duty to inquire into the grounds on

which those courts have so decided. They are questions which arise between the citizens of those states and their own city authorities, and afford no rule for construing the Constitution of the United States. . . . The main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

"It is not asserted that, in the methods by which the value of his land was ascertained for the purpose of this taxation, there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law. The tax in question was assessed and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the state tribunals on that subject that it is only necessary to refer to those decisions, without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S. 575, sub nom. Taylor v. Secor, 23 L. Ed. 663; Kennard v. Louisiana ex rel. Morgan, 92 U. S. 480, 23 L. Ed. 478; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Kirkland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Missouri v. Lewis, 101 U. S. 22, sub nom. Bowman v. Lewis, 25 L. Ed. 989; German Nat. Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469."

In Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921, a judgment of the court of appeals of the state of New York, upholding the validity of an assessment upon lands to cover the expense of a local improvement, was brought to this court for review upon the allegation that the state statute was unconstitutional. In the opinion of this court, delivered by Mr. Justice Gray, the following extract was given from the opinion of the court of appeals:

"The act of 1881 determines absolutely and conclusively

the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. . . . The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners; but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property especially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error, and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. . . . The precise wrong of which complaint is made appears to be that the land owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the

amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and, having the power, we cannot criticise the reasons or manner of its action."

This definition of legislative power was approved by this court, and the judgment of the court of appeals was affirmed. The following extract is from the opinion of this court:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

In Paulsen v. Portland, 149 U. S. 30, 40, 37 L. Ed. 637, 641, 13 Sup. Ct. Rep. 750, where the validity of a city ordinance, providing that the cost of a sewer should be distributed upon the property within the sewer district, and appointing viewers to estimate the proportionate share which each piece of property should bear, was questioned, because the ordinance contained no provision for notice, it was held by the supreme court of Oregon, and by this court on error, that notice by publication is a sufficient notice in proceedings of this nature, and that as the viewers, upon their appointment, gave notice by publication in the official paper of the city of the time and place of their first meeting, such notice was sufficient to bring the proceedings within "due process of law."

In Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L.

Ed. 369, 17 Sup. Ct. Rep. 56, was involved the validity of the irrigation act enacted by the legislature of the state of California. One of the objections urged against the act was that it permitted the whole cost to be levied by a board of directors of the district upon all of the real estate of the district according to value, with no reference to the degree of benefit conferred. As to this it was said by this court, through Mr. Justice Peckham:

"Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision." Citing Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921.

Another objection to the validity of the act was the total want of an opportunity to be heard on the question of the expediency of forming the district, on the questions of cost and of benefits received. In respect to this it was said:

"The provision for a hearing in the irrigation act is similar, and the condition therein, that lands which in the judgment of the board are not benefited shall not be included, renders the determination of the board, including them after a hearing, a judgment that such lands will be benefited by the proposed plan of irrigation.

"The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question, and gives them an opportunity to be heard before the board. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; Lent v. Tillson, 140 U. S. 316, 35 L. Ed. 419, 11 Sup. Ct. Rep. 625; Paulsen v. Portland, 149 U. S. 30, 37 L. Ed. 637, 13 Sup. Ct. Rep. 750."

"It has been held in this court that the legislature has power to fix such a district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the

amount of the tax which he is to pay. Paulsen v. Portland, 149 U. S. 30, 41, 37 L. Ed. 637, 641, 13 Sup. Ct. Rep. 750. But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited.

"Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in Spencer v. Merchant, 125 U. S. 356, 31 L. Ed. 767, 8 Sup. Ct. Rep. 921; and Walston v. Nevin, 128 U. S. 578, 32 L. Ed. 544, 9 Sup. Ct. Rep. 192."

In Bauman v. Ross, 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. Rep. 966, on appeal from the court of appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr.

Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation; and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court,—citing Willard v. Presbury, 14 Wall. 676, 20 L. Ed. 719; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098; Shoemaker v. United States, 147 U. S. 282, 302, 37 L. Ed. 170, 186, 13 Sup. Ct. Rep. 361. It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners.

This subject has been recently considered by this court in the case of Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943, 18 Sup. Ct. Rep. 521, and where it was held, after a review of the authorities, that the enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot front against all lots or land abutting on the street, road, or alley in which a water main shall be laid,—was constitutional, and was conclusive alike of the necessity of the work and of its benefit as against abutting property.

We do not deem it necessary to extend this opinion by referring to the many cases in the state courts in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another

at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley, Taxn. 447.

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." 2 Dill. Mun. Corp. § 752, 4th Ed.

This array of authority was confronted, in the courts below, with the decision of this court in the case of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law under which the improvement is made provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

But we agree with the supreme court of Missouri in its view that such is not the necessary legal import of the decision in Norwood v. Baker. That was a case where, by a village ordinance apparently aimed at a single person a portion of whose property was condemned for a street, the entire cost of opening the street, including, not only the full amount paid for the strip condemned, but the cost and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under ex-

isting statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the state."

That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in Parsons v. District of Columbia, 170 U. S. 45, 56, 42 L. Ed. 943, 947, 18 Sup. Ct. Rep. 521; and in Spencer v. Merchant, 125 U. S. 345, 357, 31 L. Ed. 763, 768, 8 Sup. Ct. Rep. 921.

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood v. Baker.

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri:

"The work done consisted of paving with asphaltum the roadway of Forest avenue in the said [Kansas] City, 36 feet in width, from Independence avenue to Twelfth street, a distance of ½ mile. Forest avenue is one of the oldest and best-improved residence streets in Kansas City, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement."

What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the state as consistent with constitutional principles.

The judgment of the Supreme Court of Missouri is affirmed.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE McKENNA) dissenting:

The special tax bills here in question purport to cover the cost of paving with asphalt a part of Forest avenue in Kansas City, Missouri. The work was done under the orders of the common council of that city, and the tax bills, it is alleged,

were made out in conformity with the provisions of the city charter.

By § 2 of article 9 of the city charter it was provided that "the city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, remacadamized, curbed, recurbed, guttered, reguttered, or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof, . . . and to pay therefor out of the general fund or by issuing special tax bills as herein mentioned. . . ."

The same section provides that no resolution for the paving, repaving, etc., of any street, alley, avenue, public highway, or part thereof "shall be passed by the common council except upon recommendation of the board of public works indorsed thereon; and provided further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have such street, alley, avenue, public highway, or part thereof paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, or remacadamized with a different kind of material or in a different manner from that specified in such resolution, then the ordinance providing for the doing of such work or making such improvement shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax bills shall cease until a sufficient number of persons so remonstrating, or their grantees, shall, in writing, withdraw their names, or the property represented by them, from such remonstrance, so that said remonstrance shall cease to represent a majority of the resident property owners as above provided, when the common council shall proceed in the manner above mentioned to cause the proposed improvement to be made." But by a subsequent section it was provided: "When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize, or remacadamize any street, alley, avenue, public highway, or part thereof, and pay therefor in special tax bills, if the common council shall, by ordinance, find and declare that the resolution provided in § 2 of this article has been published as therein required, and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public

highway, or part thereof to be improved have not filed with the city clerk a remonstrance against the doing of such work or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and no special tax bill shall be held invalid or affected for the reason that such resolution was not published as therein required, or that a remonstrance or petition sufficiently signed was filed as therein required, or that such petition was not filed or was insufficiently signed." § 4.

By § 3 it was provided that "all ordinances and contracts for all work authorized to be done by § 2 of this article shall specify how the same is to be paid for, and in case payment is to be made in special tax bills, the city shall in no event nor in any manner whatever be liable for or on account of the work."

The cost of work done on sidewalks, streets, avenues, alleys, and public highways is provided for in the 5th and 6th sections of the same article, as follows: "The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys, and public highways, or parts thereof, shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley, or public highway, or parts thereof improved, according to the frontage thereof. . . . When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax bills, the board of public works shall cause the city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the frontage of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax bills, except as hereinafter provided, make out and certify, in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax, according to such apportionment, against each lot or parcel of land to be charged."

By § 18 of the same article every special tax bill issued under its provisions is made "a lien upon the land described therein, upon the date of the receipt of the board of public works therefor, and such lien shall continue for two years thereafter."

It thus appears that under the charter of Kansas City the cost of the paving or the repaving of any street, avenue, alley,

or public highway is put upon the abutting property under a rule absolutely excluding any consideration whatever of the question of special benefits accruing, by reason of the work done, to such property. It is true the abutting owner, in defense of a suit brought on a special tax bill, may show any mastake or error in the amount of such bill, or that the work was not done in a workmanlike manner; but the cost, set forth in the tax bill, or when ascertained in a suit on the tax bill, must be borne by the abutting property, according to its frontage, even if such cost be in substantial excess of the special benefits, if any, accruing to the property assessed. So the abutting property must bear the cost, according to frontage, even if such cost equals the full or actual market value of the land. Thus, the entire property abutting on the street improved, and subjected by the statute, that is, by the city charter, to a lien in favor of the contractor or his assignee, may be taken from the owner, for the benefit of the general public, to meet the cost of improving a public highway in which the entire community is interested. But that circumstance, it is contended, is not of the slightest consequence; for—so the argument in support of the statute runs—the legislature having determined that the land abutting on a public street shall, according to its frontage, meet the cost, whatever it may be, of improving that street, the courts cannot inquire whether the owner has received any such special benefit as justifies the putting upon him of a special burden not shared by the general public for whose use the improvement was made, nor inquire whether the cost of the work equals or exceeds the value of the property. I cannot assent to this principle. It recognizes, contrary to the principles announced in Norwood v. Baker, 172 U. S. 269, 277, 279, 293, 297, 43 L. Ed. 443, 447, 452, 454, 19 Sup. Ct. Rep. 187, the existence in the legislative branch of government of powers which, I take leave to say, cannot be exercised without violating the Constitution of the United States. In that case, upon the fullest consideration, it was held, as had been held in previous cases, that the due process of law prescribed by the 14th Amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use. We also held that an assessment upon abutting property for the cost and expense incurred in opening a street was to be referred to the power of taxation, and that the Constitution of the United States forbade an exercise of that power that would put upon private property the cost of a public work in substantial excess of the special benefits accruing to it from such work. Let us see if that was not the decision of the court.

In that case the attempt was made to put upon the abutting property the entire cost incurred in opening a public street through the owner's lands. No inquiry as to special benefits was made; indeed, no inquiry of that character was per-

missible under the ordinance in virtue of which the street was opened. It was not denied that the ordinance was consistent with the statutes of the state; and the question was distinctly presented whether a special assessment for the cost of opening a street through private property could be sustained under the Constitution of the United States if it was made under a rule excluding all inquiry as to special benefits accruing to the abutting property by reason of such improvement. In that case it was the public, and not the owner of the property, that wished the street to be opened. The judgment of the circuit court enjoining the assessment as affirmed upon the ground—so our mandate expressly stated—that the assessment was "under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation." The mandate was in harmony with the opinion, for the court said: "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

As the court in the present case makes some observations as to the scope of the decision in Norwood v. Baker, it will be well to ascertain the precise grounds upon which our judgment in that case was based. Those grounds are indicated by the following extracts from the opinion:

"Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. Mobile County v. Kimball, 102 U. S. 691, 703, 704, 26 L. Ed. 238, 242; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 202, 37 L. Ed. 132, 136, 13 Sup. Ct. Rep. 293; Bauman v. Ross, 167 U. S. 548, 589, 42 L. Ed. 270, 288, 17 Sup. Ct. Rep. 966, and authorities there cited. And according to the weight of judicial authority the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In Williams v. Eggleston, 170 U. S. 304, 311, 42 L. Ed. 1047, 1049, 18 Sup. Ct. Rep. 617, where

the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns which had been judicially determined to be towns benefited by such improvement, it was said: 'Neither can it be doubted that if the state Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.' But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature, upon particular private property, of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

Again: "It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Further, in the same case: "The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion; namely: That while abutting property may be specially

assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

Does the court intend in this case to overrule the principles announced in Norwood v. Baker? Does it intend to reject as unsound the doctrine that "the principle underlying special assessments . . . to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?" Is it the purpose of the court, in his case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation being for an amount in substantial excess of the special benefits received—"will, to the extent of such excess, be a taking of private property for public use without compensation?" The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution, are set forth in Norwood v. Baker, and need not be repeated. But I may add a reference to some recent adjudications.

In Sears v. Boston, 173 Mass. 71, 78, 43 L. R. A. 834, 837, 53 N. E. 138, 139, which was the case of a special assessment to meet the cost of watering streets, the court said: "It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, contains an elaborate discussion of the subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the 14th Amendment to the Constitution of the United States, inasmuch as it would deprive one of his property without compensation, and so without due

process of law. The authority of this case is controlling in all state courts, and if it were not, it is in accordance with sound principles, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. Boston v. Boston & A. R. Co., 170 Mass. 95, 101, 49 N. E. 95, and cases cited." In Sears v. Boston Street Comrs. 173 Mass. 350, 352, 53 N. E. 876, which was the case of charges upon land to meet the cost of certain sewerage work done under municipal authority, Mr. Justice Knowlton, delivering the unanimous judgment of the court, said: "If we treat the determination of these charges as a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible under the Constitution of this commonwealth and under the Constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits. . . . The fact that the charges to be determined are for the construction, maintenance, and operation of the sewerage works of the whole city, gives some force to the possibility of a construction which includes all benefits; but whether this construction should be adopted or not, the charges may be determined on any grounds which the street commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits. This fact in itself is enough to bring the statute within the prohibition of the Constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law," citing Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187; State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs. 38 N. J. L. 190, 20 Am. Rep. 380; Barnes v. Dyer, 56 Vt. 469, and Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535. In Dexter v. Boston, 176 Mass. 247, 251, 252, 57 N. E. 379, 380, the court said: "It is now settled law in this court, as it is in the Supreme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits." To the same effect are Hutcheson v. Storrie, 92 Tex. 688, 45 L. R. A. 289, 51 S. W. 848; Adams v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; McKee v. Pendleton, 154 Ind. 652, 57 N. E. 532; Fay v. Springfield, 94 Fed. Rep. 409; Loeb v. Columbia Twp. 91 Fed. Rep. 37; Charles v. Marion, 98 Fed. Rep. 166; Cowley v. Spokane, 99 Fed. Rep. 840.

The court, after referring to the declaration of the supreme court of Missouri to the effect that the 14th Amendment was not applicable to this case, proceeds, in order to "prevent confusion and relieve from repetition," to refer to some of the cases arising under that and the 5th Amendment. In the same connection the court, referring to the 5th and 14th Amendments, says that "while the language of those amendments is the same [in respect of the deprivation of property without due process of law], yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper." As the court expressly declines to formulate any rule to determine for all cases "what it is for a state to deprive a person of life, liberty, or property without due process of law," I will not enter upon a discussion of that question, but content myself with saying that the prohibition against the deprivation of property without due process of law cannot mean one thing under the 5th Amendment and another thing under the 14th Amendment, the words used being the same in each amendment. If the court intends to intimate the contrary in its opinion, I submit that the intimation is not sustained by any former decision, and is not justified by sound principle.

The first case to which the court refers as arising under the 14th Amendment is Davidson v. New Orleans, 96 U. S. 97, 103–105, 24 L. Ed. 616, 619, 620. From that case sentences are quoted which were intended to remove the impression, then supposed to exist with some, that under that Amendment it was possible to bring "to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." But the court in the present case overlooks another part of the opinion in Davidson v. New Orleans, which was pertinent to the issue in that case, and is pertinent to the present discussion. After speaking of the difficulty of an attempt to lay down any rule to determine the full scope of the 14th Amendment, and suggesting that the wise course was to proceed by the gradual process of judicial inclusion and exclusion, the court said: "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is

appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." Here is a direct affirmation of the doctrine that a tax, assessment, servitude, or other burden may be imposed by a state, or under its authority, consistently with the due process of law prescribed by the 14th Amendment, if the person owning the property upon which such tax, assessment, servitude, or burden is imposed is given an opportunity, in some appropriate way, to contest the matter. In the present case no such opportunity was given to the plaintiffs in error, and the state court held that they had no right to show, in any tribunal, that their property was being taken for the cost of improving a public street in substantial excess of any special benefits accruing to them beyond those accruing to the general public owning and using the street so improved.

Reference is made by the court to McMillen v. Anderson, 95 U. S. 38, 41, 42, 24 L. Ed. 335, 336, in which will be found certain observations as to the words "due process of law." In that case the only question was whether a statute of Louisiana imposing a license tax, which did not give a person an opportunity to be present when the tax was assessed against him, or provide for its collection by suit, was in violation of the 14th Amendment. The court, after referring to the provision requiring, in case the license tax was not paid, that the collector should give ten days' written or printed notice to the delinquent, and if at the expiration of that time the license was not fully paid the tax collector might, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent, or so much as might be necessary to pay the taxes and costs, said: "Another statute declares who is liable to his tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection. Here is a notice that the party is assessed, by the proper officer, for a given sum, as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void. Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal. But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the

proceedings for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, arts. 296–309, inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction." Here we have, contrary to the intimation given in the opinion of the court in this case, a recognition of the principle that the 14th Amendment does apply to cases of taxation under the laws of a state. And it is to be observed that the court in McMillen v. Anderson takes care to show that under the laws of Louisiana the taxpayer was given an opportunity to be heard in respect of the validity of the tax imposed upon him.

Among the cases cited in support of the conclusions announced by the majority are: Mattingly v. District of Columbia, 97 U. S. 687, 692, 24 L. Ed. 1098, 1100; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921; Paulsen v. Portland, 149 U. S. 30, 40, 37 L. Ed. 637, 641, 13 Sup. Ct. Rep. 750; Bauman v. Ross, 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. Rep. 966; and Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943, 18 Sup. Ct. Rep. 521.

It seems to me quite clear that the particular question before us was not involved or determined in any of those cases.

In Mattingly v. District of Columbia it was said that the legislature may direct special assessments for special road or street improvements "to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion." But that falls far short of deciding that an assessment in proportion to frontage could be sustained if it exceeded the value of the property or was for an amount in excess of the special benefits accruing to the property assessed. Besides, no question was made in that case as to the cost of the work exceeding special benefits.

In Kelly v. Pittsburgh the only point involved or adjudged was that the 14th Amendment did not stand in the way of the legislature of a state extending the limits of a city or township so as to include lands fit for agricultural use only, and make them subject to taxation for the local purposes of the extended city or town, although the owners did not enjoy the advantages of the municipal government to the same extent as those who resided in the thickly settled parts of the city or town. It was not a case in which the property of particular persons was specially assessed by a rule not applicable to all other assessments. On the contrary it was admitted in that case that the methods adopted to ascertain the value for purposes of local taxation of the lands there in question were such as were usually employed, and that the manner of apportioning and collecting the tax was not unusual or materially different from that in force in all communities

where land was subject to taxation. It was held that it was not the function of the court to correct mere errors in the valuation of lands for purposes of taxation.

In Spencer v. Merchant no question arose as to an excess of the cost of the improvement there in question over special benefits. The question before the court was as to the constitutionality of a statute validating what had been judicially determined to be a void assessment. This court so declared when it said that the plaintiff, who questioned the validity of the statute, contended "that the statute of 1881 was unconstitutional and void because it was an attempt by the legislature to validate a void assessment without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment." The court held that the statute itself was, under the circumstances of that case, all the notice and hearing the owners of the lands required. There was no occasion for any general declaration as to the powers of the legislature which would cover cases of void assessments validated by legislative enactment where the amount assessed upon particular property was in substantial excess of special benefits accruing to it. Referring to Spencer v. Merchant, this court said in Norwood v. Baker: "The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

In Paulsen v. Portland the only point adjudged was that notice, by publication in a newspaper, of the time and place of the meeting of viewers appointed to estimate the proportionate share which each piece should bear of the amount to be assessed upon the property in a sewer district for the cost of a sewer, was sufficient "to bring the proceedings within due process of law." The court in that case took care to say that it did not question the proposition that "notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property." That case cannot be held to support the views of the supreme court of Missouri, for that court in this case held in substance that, under legislative authority, property fronting on a public street could all be taken to pay the cost of improving the street, leaving nothing whatever to the owner, and that, too, without any notice and without any right in the owner, in any form, to show that the amount required to be paid exceeded, not only any special benefits accruing to the property, but even the value of the property assessed.

In Bauman v. Ross we had a case in which a special assessment was made, under an act of Congress, imposing upon the

lands benefited one half of the amount awarded by the court as damages for each highway or reservation, or part thereof, condemned and established under the act. The assessment was directed to be "charged upon the lands benefited by the laying out and opening of such highway or reservation or part thereof," and the jury was directed "to ascertain and determine what property is thereby benefited." The same act directed the jury to assess against each parcel which it found to be so benefited its proportional part of the sum assessed, provided that as to any tract, part of which only had been taken, due allowance should be made for the amount, if any, "which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract." In such a case the owner of the property being given full right to be heard before an authorized tribunal upon the question of special benefits, no question could arise such as is presented in the present one.

In Parsons v. District of Columbia the question was as to the validity of an act of Congress which provided for establishing, in this District, "a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and of water mains." It was provided that assessments levied for water mains should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road, or alley in which a water main is laid. This court, among other things, said: "Another complaint urged is that the assessment exceeded the actual cost of the work, and this is supposed to be shown by the fact that the expense of putting down this particular main was less than the amount raised by the assessment. But this objection overlooks the fact that the laying of this main was part of the water system, and that the assessment prescribed was not merely to put down the pipes, but to raise a fund to keep the system in efficient repair. The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system." But the court took care to add, "and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." The words thus added are significant, and if they had not been added the opinion would not have passed without dissent. The words referred to justify the conclusion that if there had been an abuse of legislative power; if the amount assessed had been substantially or materially in excess of the cost of the work or of the value of the property assessed or of the special benefits received, the owners of the abutting property might justly have complained of a violation of their constitutional rights.

The court, in its opinion, quotes certain passages from Cooley's Treatise on Taxation, in which the author refers to the different modes in which the cost of local public work may be met; namely: (1) a general tax to cover the major

part of the cost, the smaller portion to be levied upon the estates specially benefited; (2) a tax on the land specially benefited to meet the major part of the cost, the smaller part to be paid by the general public; and (3) a tax for the whole cost on the lands in the immediate vicinity of the work. In respect of each of these methods the court cites these words of Cooley: "In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley, Taxn. 447, chap. 20, § 5; Id. 2d Ed. 637, § 5.

But in the same chapter from which the above extract was made the author discusses fully the underlying principle of special assessments, saying: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." Cooley, Taxn. 416, chap. 20, § 1; Id. 2d Ed. 606, § 1. To this we may add the declaration of the author when, speaking for the supreme court of Michigan in Thomas v. Gavin, 35 Mich. 155, 162, 24 Am. Rep. 535, 538, he said: "It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful as constituting an attempt to appropriate private property to public uses."

The court overlooked other passages in the same chapter of Cooley's Treatise on Taxation. Referring to the rule of

assessment by the front foot upon property abutting on a local improvement, where no taxing district has been established over which the cost could be distributed by some standard of benefit, actual or presumptive, Cooley says: "But it has been denied, on what seem the most conclusive grounds, that this is permissible. It is not legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army or any portion of it should be stationed for the time being should be charged with its support. If one is legitimate taxation the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the sense of those terms as applied to the exercise of powers by any enlightened or responsible government." Cooley, Taxn. 453, chap. 20, § 53; Id. 2d Ed. 646, 647.

The author also says what I do not find in the opinion of the court in this case: "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation." Cooley, Taxn. 2d Ed. 661.

The court also cites from Dillon's Treatise on Municipal Corporations certain passages to the effect that whether the expense of making local improvements "shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative

expediency." 2 Dill. Mun. Corp. 4th Ed. p. 912, § 752. These views need not be controverted in this case, and of their soundness I have no doubt when we are ascertaining the general rule to be applied in the particular classes of cases referred to by the author. But the above quotation from Dillon by no means indicates his opinion as to the application of the general rule announced by him. In the same chapter from which the court quotes I find the following principles announced by the author as deduced from an extended reference to numerous adjudged cases: "Special benefits to the property assessed; that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again: "When not restrained by the Constitution of the particular state, the legislature has a discretion commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York (People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266), have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." 2 Dill. Mun. Corp. 4th Ed. p. 934, § 761. Further, the author says: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvements, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts

of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." 2 Dill. Mun. Corp. 4th Ed. p. 935, § 761.

I agree with the court in saying that Cooley and Dillon are text writers of high authority for learning and accuracy. But I cannot agree that the extracts from their treatises found in its opinion correctly or fully state their views upon the particular question now before us.

The declaration by the court that the decision in Norwood v. Baker was placed upon the ground that the burdens imposed upon Mrs. Baker's property amounted to confiscation is, I submit, an inadequate view of our decision. The word "confiscation" is not to be found in the opinion in that case. The affirmance of the judgment in that case was upon the sole ground that the assessment was made under a rule that absolutely excluded any inquiry as to special benefits. Such a rule was held to be void because it rested upon the theory that to meet the cost of opening a street private property could be specially assessed for an amount in substantial excess of special benefits accruing to it from the improvement made in the interest of the general public.

If it may be inferred from what is said in the opinion of the court in this case that a special assessment resulting in the confiscation of the entire property assessed might not be sustained I have to say that manifestly confiscation does occur when the property specially assessed is all taken to meet the cost of a public improvement supposed to be specially beneficial to the owner. So if the property is assessed beyond the special benefits accruing there is confiscation to the extent of such excess. But if confiscation, in any form, will not be tolerated, what becomes of the broad declarations in the opinions in some of the cited cases to the effect that the legislature may prescribe the extent to which private property is specifically benefited by a local public improvement, and that its action in that respect cannot be questioned by the owner of the property assessed even if it appeared that the amount assessed exceeded the special benefits, or even if it appeared that the cost of the improvement exceeded the value of the property assessed? Are we to understand from the interpretation now placed upon the decision in Norwood v. Baker that the courts may, for the

protection of the property owner, interfere when a legislative determination amounts to confiscation, pure and simple, but that they cannot interfere when the amount assessed is in substantial excess of the benefits received?

In my judgment, some of the cases referred to in the opinion of the court contain general declarations as to the powers of the legislature in the matter of special assessments which went far beyond what was necessary to be said in order to dispose of the respective cases. Those declarations, literally interpreted, seem to recognize the legislature in this country as possessing absolute, arbitrary power in the matter of special assessments imposed to meet the cost of a public improvement,—indeed, all the powers, in the matter of taxation, that belong to the Parliament of Great Britain. The opinions in some of these cases recall the wise observations of Chief Justice Marshall, when, speaking for this court, he said: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257, 290. We live under a Constitution which is the supreme law of the land. It enumerates the powers of government, and prescribes limitations and restrictions upon legislative authority as to the property of citizens. Some of these limitations and restrictions apply equally to the Congress of the United States and to the legislatures of the states. If it be true that the only ground upon which a special assessment can be legally imposed upon particular private property to meet the cost of a public improvement is that such property receives, or may reasonably be held to receive, special benefits not shared by the general public,—and no one, I take it, will dispute the soundness of that principle,—and if it be true that the property cannot be made to bear a proportion of such costs in substantial excess of special benefits, it necessarily follows that the owner of the property is entitled to protection against any legislative rule or requirement that puts upon his property a burden greater than can be lawfully imposed upon it. How can he obtain such protection except through the courts? To say that he cannot do so is to say that the legislature possesses an absolute, unlimited power over rights of property which is inconsistent with the supreme law of the land. Is it to become a canon of constitutional construction that the courts may interfere when the legislature authorizes a special assessment that will

amount to the confiscation of the entire property assessed, but will not interfere when the confiscation is only to a limited, although a material, extent? In other words, Is there to be a difference, so far as the powers of the courts are concerned, between confiscation, under the guise of taxation, of the entire property of the citizen, and confiscation of only a part of it?

I have spoken of special assessments where the amount assessed was in substantial excess of special benefits. The words "substantial excess" have been used because, in the language of this court in Norwood v. Baker, already cited, exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a substantial character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. I do not doubt—indeed, the opinion in Norwood v. Baker concedes—that the legislature has a wide discretion in cases of special assessments to meet the cost of improving or opening public highways.. But I deny that the owner of abutting property can be precluded from showing that the amount assessed upon him is in substantial excess of special benefits accruing to his property. To the extent of such excess the burden should be borne by the community for whose benefit the improvement is made. I entirely concur in the views of Church, Ch. J., as expressed in Guest v. Brooklyn, 69 N. Y. 506. He said: "The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding improvements which they may enjoy without expense to themselves." 2 Dill. Mun. Corp. 4th Ed. 934, note 1.

At the same time this case was determined the court announced its judgment in Wight v. Davidson, 181 U. S. —, ante, 616, 21 Sup. Ct. Rep. 616, on appeal from the court of appeals of the District of Columbia. In its opinion in that case it makes some reference to Norwood v. Baker to which it is appropriate to refer in this opinion. The court, in Wight v. Davidson, says: "There [In Norwood v. Baker] the

question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the state had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use, without compensation, and accordingly affirmed the decree of the circuit court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found, upon due and proper inquiry, to be equal to the special benefits accruing to the property." This language implies that the assessment in Norwood v. Baker was without legislative sanction and hence the judgment rendered by this court; whereas, it distinctly and unmistakably appears from the opinion in that case that what the village of Norwood did was under a legislative enactment authorizing it to open the street there in question and assess the cost upon the abutting property, according to its frontage, without regard to special benefits, and without any inquiry upon that subject. And it was because and only because of this rule established by the legislature that the court held the assessment invalid. I submit that this case cannot be distinguished from Norwood v. Baker upon the ground that the village of Norwood proceeded without legislative sanction.

In my opinion the judgment in the present case should be reversed upon the ground that the assessment in question was made under a statutory rule excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation.

NOTE.

Local Assessments—Front-Foot Rule.—After many conflicting views from text writers of recognized ability and courts of last resort all over

the United States, it was generally supposed that the question of the constitutionality of the "front-foot rule" in local assessments was unequivocally answered in the negative and forever set at rest by the majority opinion in Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187, the question being one of construction of the federal constitution and binding on all the courts, state and federal. That such was the generally accepted view is proved by the fact that since the rendition of the opinion in that case the laws of a number of states have been declared unconstitutional as being in conflict with the principles there laid down. Zehnder *v.* Barber Asphalt Paving Co., 106 Fed. 103; Parker *v.* City of Detroit, 103 Fed. 357; Bidwell *v.* Huff, 103 Fed. 362; Charles *v.* City of Marion, 100 Fed. 538; Cowley *v.* City of Spokane, 99 Fed. 840; Lyon *v.* Tonawanda, 98 Fed. 361; Fay *v.* City of Springfield, 94 Fed. 409; Loeb *v.* Trustees Columbia Township, 91 Fed. 37; Hutcheson *v.* Storrie, 92 Tex. 685, 51 S. W. Rep. 848. But notwithstanding the grounds on which it is sought to be distinguished, it is hard to see that the decision in Norwood *v.* Baker is not overruled by the principal case; and see also, Shumate *v.* Heman, 181 U. S. 402, 21 Sup. Ct. Rep. 645, *post*, 40; Cass Farm Co. *v.* Detroit, 181 U. S. 396, 21 Sup. Ct. Rep. 644, *post*, 37; City of Detroit *v.* Parker, 181 U. S. 399, 21 Sup. Ct. Rep. 645; Wight *v.* Davidson, 181 U. S. 371, 21 Sup. Ct. Rep. 616, *post*, —; Tonawanda *v.* Lyon, 181 U. S. 389, 21 Sup. Ct. Rep. 609, *post*, 42; Webster *v.* City of Fargo, 181 U. S. 394, 21 Sup. Ct. Rep. 623, *post*, 46.

For decision of lower court in Barber Asphalt Paving Co. *v.* French, see 4 Mun. Corp. Cas. 754. See also, Dexter *v.* City of Boston, 4 Mun. Corp. Cas. 4; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; and extensive *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652, in which the cases are collected by states.

CASS FARM COMPANY, Limited, and Others, Plffs. in Err., *v.* CITY OF DETROIT and Others.

(*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 644.]

Constitutional Law—Local Assessments—Front-Foot Rule.* — An assessment of the cost of paving upon abutting property in proportion to the frontage of such property, when authorized by the city charter and ordinances, is not in violation of the Constitution of the United States.

In Error to the Supreme Court of the State of Michigan to review a decision reversing a decree for an injunction against paving a portion of an avenue. Affirmed.

See same case below, 7 Det. L. N. 283, 83 N. W. 108.

The facts are stated in the opinion.

Mr. Henry M. Campbell for plaintiffs in error.

Messrs. Timothy E. Tarsney and C. D. Joslyn for defendants in error.

MR. JUSTICE SHIRAS delivered the opinion of the court:

A bill in equity was filed in September, 1898, in the circuit court for the county of Wayne, state of Michigan, by the Cass Farm Company, Limited, and others, owners of lands

*See *note* to French *v.* Barber Asphalt Paving Company, *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652.

lying and abutting upon Second avenue in the city of Detroit, against said city, the board of public works, and the Alcatraz Asphalt Paving Company, whereby it was sought to enjoin the city of Detroit from paving a portion of Second avenue, and to have the proceedings taken with reference to said paving declared void.

There was a decree in the circuit court in favor of complainants, and thereupon the case was taken to the supreme court of the state of Michigan. where the decree of the trial court was reversed, and a decree was entered dismissing the complainants' bill, with costs of both courts.

We learn from a statement in the opinion of the supreme court that, among other grounds of relief stated in the bill, was the following:

"That the provisions of the charter and of the paving ordinances of the city, in so far as the same provide for an assessment of the cost of paving upon the abutting property in proportion to the frontage of such property, were in violation of the Constitution of the United States and the amendments thereof, and therefore null and void."

The state supreme court disposed of this contention in the following language:

"In paving cases the rule has been settled in this state by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage. . . .

"It was said by Mr. Justice Cooley in Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52:

" 'We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases and have recognized the principle as settled; and if the question were new in this state we might think it important to refer to what they say; but the question is not new. It was settled for us thirty years ago.'

"We should feel inclined to follow the opinion of the Supreme Court of the United States in Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, inasmuch as it was based upon the 14th Amendment of the Constitution of the United States, if that were a paving case; but that was a street-opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions." Cass Farm Co. v. Detroit (Mich.) 7 Det. L. N. 283, 83 N. W. 108.

We have recently held that it was not the intention of the 14th Amendment to subvert the systems of the states pertaining to general and special taxation; that that Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of Norwood v. Baker. French v. Asphalt Paving Co., 181 U. S. —, ante, 625, 21 Sup. Ct. Rep. 625; Tonawanda v. Lyon, 181 U. S. —, ante, 609, 21 Sup. Ct. Rep. 609; Wight v. Davidson, 181 U. S. —, ante, 616, 21 Sup. Ct. Rep. 616.

We are not convinced, by anything appearing in this record, that the complainants have entitled themselves to the interference of this court. As held by the supreme court of their own state, the proceedings to enforce the payment of their proportion of a common burden have been conducted in due regard to the forms and provisions of the statutes and ordinances applicable to the facts of the case, and disclose no departure, actual or intended, from constitutional principles.

The judgment of the Supreme Court of the State of Michigan is affirmed.

CASS FARM COMPANY, Limited, and Others, Plffs. in Err., *v.* CITY OF DETROIT and Others (No. 508).*

CITY OF DETROIT and Others, Appts., *v.* RALZEMOND A. PARKER (No. 411).

MORTIMER WEBSTER, Plff. in Err., *v.* CITY OF FARGO and Others (No. 378).

JOHN L. SHUMATE, Plff. in Err., *v.* AUGUST HEMAN (No. 550).

JAMES L. WORMLEY, Plff. in Err., *v.* DISTRICT OF COLUMBIA (No. 101).

ANNA P. HOOVER ALLEN and Others, Plffs. in Err., *v.* DISTRICT OF COLUMBIA (No. 102).

THOMAS F. FARRELL *et al.*, Plff. in Err., *v.* WEST CHICAGO PARK COMMISSIONERS (No. 201).

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE McKENNA) dissenting:

The controlling question in each of the above cases is the

*See *note* to French *v.* Barber Asphalt Paving Co., *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652.

same as is presented in French v. Barber Asphalt Paving Co., 181 U. S. —, ante, 625, 21 Sup. Ct. Rep. 625, Wight v. Davidson, 181 U. S. —, ante, 616, 21 Sup. Ct. Rep. 616, and Tonawanda v. Lyon, 181 U. S. —, ante, 609, 21 Sup. Ct. Rep. 609, just decided. For the reasons stated in my opinion in those cases, I dissent from the opinions and judgments of the court in the above cases.

JOHN L. SHUMATE, Plff. in Err., *v.* AUGUST HEMAN.

(*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 645.]

Constitutional Law—Local Assessments—Front-Foot Rule.* — This case is determined by the decision in French *v.* Barber Asphalt Paving Company, *ante*, 625, 21 Sup. Ct. Rep. 625.

In Error to the Supreme Court of the State of Missouri to review a decision affirming a judgment enforcing payment of a special tax bill for construction of a sewer. Affirmed.

See same case below, sub nom. Heman v. Allen, 156 Mo. 534, 57 S. W. 559.

The facts are stated in the opinion.

Messrs. G. B. Webster, Hiram J. Grover, and Hamilton Grover for plaintiff in error.

Messrs. Robert E. Collins, David Goldsmith, and H. P. Rodgers for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court:

This was a suit brought in the circuit court of the city of St. Louis by August Heman to enforce payment of a special tax bill issued in his favor by that city for the construction of a sewer in what is called Euclid avenue sewer district. The plaintiff recovered a judgment, and the defendants, who were owners of property assessed for the cost of making said sewer, appealed to the supreme court of Missouri, where the judgment of the trial court was affirmed, the case being reported as Heman v. Allen, 156 Mo. 534, 57 S. W. 559, and after such affirmance the defendant brought the case to this court by writ of error.

The only question which is open to our consideration upon this record is the contention of the plaintiff in error that the provisions of the charter of the city of St. Louis, the ordinances of the municipal assembly, and the contract with the defendant in error, made thereunder, and the assessment against the property of the plaintiff in error for the cost of the construction of said sewer, were null, void, and of no effect for the reason that they were repugnant to the 14th Amendment of the Constitution of the United States, as construed

*See *note* to French *v.* Barber Asphalt Paving Co., *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652.

and applied in the case of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187.

This contention has been considered and determined, under a similar state of facts, by this court, in the recent case of French v. Barber Asphalt Paving Co. in error to the supreme court of the state of Missouri (181 U. S. —, ante, 625, 21 Sup. Ct. Rep. 625), and upon the authority of that case the judgment of the Supreme Court of Missouri is affirmed.

For dissenting opinion, see Cass Farm Co. v. Detroit, 181 U. S. —, ante, 645, 21 Sup. Ct. Rep. 645.

JAMES L. WORMLEY, Plff. in Err., *v.* DISTRICT OF COLUMBIA.

ANNA P. HOOVER ALLEN and Others, Plffs. in Err., *v.* DISTRICT OF COLUMBIA.

(*Submitted November 12, 1900. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 609.]

Constitutional Law—Assessments for Improvements.*

In Error to the Court of Appeals of the District of Columbia to review decisions sustaining assessments. Affirmed.

See same cases below, 15 App. D. C. 58, 70.

Messrs. D. W. Baker, John C. Gittings, and Malcolm Hufty for plaintiffs in error.

Messrs. A. B. Duvall and C. A. Brandenburg for defendant in error.

PER CURIAM:

And now, April 29, 1901, the judgments in the foregoing cases are affirmed, with costs, on the authority of Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943, 18 Sup. Ct. Rep. 521, and French v. Barber Asphalt Paving Co., 181 U. S. —, post, 625, 21 Sup. Ct. Rep. 625.

For dissenting opinion, see Cass Farm Co. v. Detroit, 181 U. S. —, post, 645, 21 Sup. Ct. Rep. 645.

*See *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652.

THOMAS F. FARRELL *et al.*, Plffs. in Err., *v.* WEST CHICAGO PARK COMMISSIONERS.

(*Argued March 18, 19, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 609.]

Constitutional Law—Assessments for Improvements.*—This case is determined by the decision rendered in the case of French *v.* Barber Asphalt Paving Company, *post*, 625, 21 Sup. Ct. Rep. 625.

In Error to the Supreme Court of the State of Illinois to review a decision sustaining assessments for the improvement of an avenue or boulevard. Affirmed.

See same case below, 182 Ill. 250, 55 N. E. 325.

The facts are stated in the opinion.

Messrs. George W. Wilbur and Newton A. Partridge for plaintiffs in error.

Messrs. R. A. Childs, Francis A. Riddle, and Charles Hudson for defendants in error.

MR. JUSTICE SHIRAS delivered the opinon of the court:

This case originated in proceedings to create and improve an avenue or thoroughfare known as Douglas boulevard, in the town of West Chicago.

The full history of those proceedings, contained in the statement of facts made by this court in the case of Lombard v. West Chicago Park Comrs. recently decided, 181 U. S. 33, ante, 507, 21 Sup. Ct. Rep. 507, renders it unnecessary to repeat them here. And the legal questions involved were so fully discussed in that case, and in French v. Barber Asphalt Paving Co. 181 U. S. —, post, 625, 21 Sup. Ct. Rep. 625, and Wight v. Davidson, 181 U. S. —, post, 616, 21 Sup. Ct. Rep. 616, cognate cases decided at the present term of this court, that we are relieved from their further consideration.

The judgment of the Supreme Court of the State of Illinois is affirmed.

For dissenting opinion, see Cass Farm Co. v. Detroit, 181 U. S. —, post, 645, 21 Sup. Ct. Rep. 645.

TOWN OF TONAWANDA and John K. Patton, Appts., *v.* JAMES B. LYON.

(*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 609.]

Constitutional Law—Assessment for Pavement—Rule of Frontage.*—The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any judicial inquiry

*See *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652.

as to their value or the benefits they receive, may be authorized by the legislature; and this will not constitute a taking of property without due process of law.

Appeal from the Circuit Court of the United States for the Northern District of New York to review a decree restraining the collection or enforcement of assessments for paving. Reversed.

Statement by MR. JUSTICE SHIRAS:

This was the case of a bill in equity filed in the circuit court of the United States for the northern district of New York on September 9, 1899, by James B. Lyon, a citizen of the state of New York, against the town of Tonawanda, a municipal corporation of that state, and John K. Patton, supervisor of said town. The object of the bill was to restrain the defendants from enforcing payment of a certain assessment against tracts or parcels of land belonging to the complainant, situated in the town of Tonawanda, and abutting on Delaware street in said town. The assessment was levied against said tracts of land to meet the expense of grading and paving said street, in pursuance of the provisions of statutes of the state of New York and of an order of the town board of Tonawanda. The principal matter complained of was that the method of meeting the expense of grading and paving the said street was by assessing the same against the lots abutting on the street according to frontage thereon, and that the statutes and proceedings thereunder, which provided for that method, were contrary to the provisions of the Constitution of the United States, in that thereby the land of the complainant would be taken for public use without just compensation, and he be deprived of his property without due process of law.

The case came on for final hearing on bill, answer, and a stipulation of facts, and on January 17, 1900, the circuit court decreed, among other things, as follows:

"That those parts of the acts of the legislature of the state of New York mentioned and set forth in plaintiff's bill of complaint, to wit, of chapter 550 of the laws of the state of New York for the year 1893, and of chapter 816 of the laws of the state of New York for the year 1895, which authorize and require the town board of said town to levy the assessment for the entire expense of paving said Delaware street, set forth in the bill of complaint, upon the complainant's said parcels of land described in said bill of complaint and the other lands fronting on said Delaware street, and the acts of the said defendant, the town of Tonawanda, by its town board, mentioned in said bill of complaint, in levying said assessments upon said lands according to the rule prescribed in said acts of said legislature, to wit, in the proportion which the number of front feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment,

bear and are to the aggregate number of feet of frontage of all the lots of land so bounding on the portion of said street in front of which said improvement was made, was and were, and each and every of said provisions of said acts of the legislature of the state of New York, and all acts of said defendant, the town of Tonawanda, in levying said assessment in the manner and form aforesaid, are wholly unconstitutional and void as being contrary to the provisions of the Constitution of the United States."

And thereupon the town of Tonawanda and John K. Patton as supervisor of said town were forever enjoined and restrained "from in any manner collecting or enforcing payment of such assessments against said complainant or his land or property." 98 Fed. Rep. 361.

On January 17, 1900, an appeal from said decree to this court was prayed for and allowed.

Mr. John Cunneen for appellants.

Mr. Tracy C. Becker for appellee.

Messrs. Edward C. Mason and Ralph T. Kellogg, counsel for other landowners on this brief.

MR. JUSTICE SHIRAS delivered the opinion of the court:

The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the state of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power. People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Rep. 266; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682.

What was claimed was that a state statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the state may have held otherwise, it was its duty to follow the decision of this court in the case of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in Norwood v. Baker, the learned judge extended the doctrine of that case beyond its necessary meaning,.

It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the 14th Amendment of the Constitution of the United States. The purpose of that Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress. The case of Norwood v. Baker presented, as the judge in the court in the present case well said, "considerations of peculiar and extraordinary hardships," amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the 14th Amendment.

The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the Norwood Case.

It is unnecessary to enter into an examination of the authorities on this subject, as that has recently been done in French v. Barber Asphalt Paving Co. 181 U. S. —, post, 625, 21 Sup. Ct. Rep. 625, in error to the supreme court of the state of Missouri, and in Wight v. Davidson, on appeal from the court of appeals of the District of Columbia, in the former of which the effect of the 14th, and, in the latter, that of the 5th, Amendment was considered. 181 U. S. —, post, 616, 21 Sup. Ct. Rep. 616.

There were other questions passed upon in the trial court and discussed in the briefs, but the conclusion we now reach renders it unnecessary for us to consider them.

The decree of the Circuit Court is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE McKENNA) dissenting:

My views touching the general questions arising in this case have been expressed in French v. Barber Asphalt Paving Co. 181 U. S. —, post, 625, 21 Sup. Ct. Rep. 625, and in Wight v. Davidson, just determined, 181 U. S. —, post, 616, 21 Sup. Ct.. Rep. 616. I adhere to those views, and therefore dissent from the judgment in this case. As stated by the circuit court, the special assessment in question was "in the proportion which the number of front feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said

assessment, bear and are to the aggregate number of feet of frontage of all the lots so bounding on the portion of said street in front of which said improvement was made." The case, therefore, is one in which, beyond question, private property is specially assessed by the front foot, in the interest of the whole public, for the entire cost of paving a highway, without reference to any special benefits accruing to it, and without the owner of the property being permitted to show that such cost amounts to the confiscation of his property to the extent that it substantially exceeds special benefits, or that it exceeds the value of the property assessed.

The court says that it was not the intention of this court in Norwood v. Baker to hold "that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the 14th Amendment of the Constitution of the United States." The contrary was not asserted by the learned judge of the circuit court, nor has anyone in this case contended that the 14th Amendment subverted the taxing systems of the states. But it was contended, and such is my position, that nothing can be done by or under the authority of a state in violation of that Amendment. After that Amendment became part of the Constitution, the only provisions in the state taxing laws or systems that ceased to have operation were those that were inconsistent with the Amendment. No one, I assume, will dispute that proposition.

The court also says that the purpose of the 14th Amendment "is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress." I assent most cordially to this view, and therefore, in another case, felt obliged to express my objection to the intimation that possibly that might be done by Congress under the due process clause of the 5th Amendment which could not be done by a state under the same clause of the 14th Amendment.

MORTIMER WEBSTER, Plff. in Err., *v.* CITY OF FARGO and Others.

(*Argued and Submitted February 25, 26, 27, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 623.]

Constitutional Law—Local Assessments—Front-Foot Rule.*—It is within the power of the legislature of a state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or to superficial area or frontage.

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*See *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* Shelbyville, 3 Mun. Corp. Cas. 652.

Webster *v.* City of Fargo

In Error to the Supreme Court of the State of North Dakota to review a decision affirming a judgment dismissing a complaint in an action for an injunction against an assessment. Affirmed.

See same case below, 82 N. W. 732.

Statement by MR. JUSTICE SHIRAS:

This was an action brought by Mortimer Webster in the district court in and for the county of Cass and state of North Dakota, against the city of Fargo; James M. Fargo, as auditor of said city; D. C. Ross, as treasurer, and G. J. Olson, as auditor, of Cass county, in which the plaintiff sought to enjoin the defendant from enforcing an assessment for grading and paving against certain lots or pieces of land belonging to the plaintiff, and abutting on the streets of the city of Fargo.

It was admitted, and indeed, alleged, in the complaint, that "each and every of the acts and proceedings required to be done and taken by the statutes of said state of North Dakota in making and return of said assessment, as aforesaid, were duly taken and done," but it was alleged that the state statutes, under which the work was done and the assessment made, were in violation of the 14th Amendment of the Constitution of the United States, in that they prescribed for paying for grading and paving the streets, by an assessment upon abutting lots by the foot-front rule.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and, as the plaintiff declined to amend, entered a judgment dismissing the complaint. From this judgment an appeal was taken to the supreme court of the state of North Dakota, which court affirmed the judgment of the district court dismissing the complaint. A writ of error from this court was thereupon allowed by the Chief Justice of the supreme court of the state of North Dakota.

Messrs. Seth Newman and B. F. Spalding for plaintiff in error.

Mr. S. B. Pinney submitted the case for defendants in error, and Messrs. John E. Green and H. F. Miller were with him on the brief.

MR. JUSTICE SHIRAS delivered the opinion of the court:

It is conceded in this record that the plaintiff in error has no ground to complain of any discrimination attempted against him, either in the statutes of the state or in the proceedings thereunder, whereby the tax in question was assessed against his property. The sole contention on his behalf is that, under the decision of this court in the case of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, all special assessments upon the basis of frontage are in violation of the 14th Amendment to the constitution of the United States,

in that they may result in the taking of property without due process of law.

But we agree with the supreme court of North Dakota in holding that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court, in Norwood v. Baker, to hold otherwise.

It is unnecessary to enter upon an examination of the authorities, as that has recently been done in the case of French v. Barber Asphalt Paving Co. 181 U. S. —, post, 625, 21 Sup. Ct. Rep. 625; and, upon the authority of that case, the judgment of the Supreme Court of North Dakota is affirmed.

For dissenting opinion, see Cass Farm Co. v. Detroit, 181 U. S. —, post, 645, 21 Sup. Ct. Rep. 645.

CITY OF DETROIT and Others, Appts., *v.* RALZEMOND A. PARKER.

(*Argued February 25, 26, 27, 1901. Decided April 29, 1901.*)

[21 Sup. Ct. Rep. 624.]

Constitutional Law — Local Assessments — Front-Foot Rule.* — An assessment of the cost of a street improvement, made arbitrarily according to the front foot, is not in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment.

Appeal from the circuit court of the United States for the Eastern District of Michigan to review a decision granting an injunction against assessments and tax sales. Reversed.

See same case below, 103 Fed. Rep. 357.

The facts are stated in the opinion.

Messrs. Timothy E. Tarsney and C. D. Joslyn, for appellants.

Mr. Elbridge T. Bacon, for appellee.

MR. JUSTICE SHIRAS delivered the opinion of the court:

This was the case of a bill in equity filed in the circuit court of the United States for the eastern district of Michigan by Ralzemond A. Parker, a citizen of the state of Michigan, against the city of Detroit and certain officers of said city, seeking to set aside certain assessments and tax sales of complainant's land for the paving of Woodward and Blaine avenues in the city of Detroit. The paving in question was done in pursuance of certain statutes of the state of Michigan, constituting the charter of the city of Detroit, and of ordinances of the common council of said city.

*See *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1; *note* to Fay *v.* Springfield, 2 Mun. Corp. Cas. 183; *note* to Adams *v.* Shelbyville, 3 Mun. Corp. Cas. 652.

There was no allegation or proof that, in the proceedings which resulted in the making of the improvements and in assessing complainant's lots for a portion of the costs thereof, there had been any disregard of the provisions of the statutes and ordinances, or that complainant's property had been charged differently from that of the other lot owners. Nor was it alleged that the portion or share of the cost of making the improvements assessed against complainant's property in point of fact exceeded the benefits accruing to each property by reason of such paving.

The only foundation of the bill was the allegation that "the said statutes and ordinances providing for the paving and grading of streets are in violation of the rights of the complainant under the 14th Amendment of the Constitution of the United States, in that they do not provide for any hearing or review of assessments at which the property owner can show that his property was not benefited to the amount of such assessments, but that the same shall be made arbitrarily according to the foot front."

The case was thus disposed of by the learned judge in the circuit court:

"It is the claim of complainant that the charter, in the provisions mentioned (that the entire cost of the street improvements, except for street and alley crossings, etc., shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property or the relation to the cost of the improvement), is in conflict with the 14th Amendment of the Constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The case of the village of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, is the foundation for this position, and seems fully to sanction it. . . . The supreme court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in Baker v. Norwood must be confined to the facts of that case and have no application to an assessment for paving. With all respect for that learned tribunal, I am constrained under the cases cited to a different opinion of the decision, and to follow the Supreme Court of the United States upon the construction of the 14th Amendment of the Federal Constitution."

Accordingly a decree was entered in accordance with the prayer of the bill, and a perpetual injunction was issued. Parker v. Detroit, 103 Fed. Rep. 357.

This court has recently decided, in the case of Cass Farm Co. v. Detroit, affirming a judgment of the supreme court of Michigan, that "it was not the intention of the 14th Amendment to subvert the system of the states pertaining to general

and special taxation; that that Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress; and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of Norwood v. Baker." 181 U. S. —, post, 645, 21 Sup. Ct. Rep. 645.

Like conclusions were reached, after a full consideration of the authorities, in French v. Barber Asphalt Paving Co. 181 U. S. —, post, 625, 21 Sup. Ct. Rep. 625, and in Wight v. Davidson, 181 U. S. —, ante, 616, 21 Sup. Ct. Rep. 616.

The decree of the Circuit Court is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.

For dissenting opinion see Cass Farm Co. v. Detroit, 181 U. S. —, post, 645, 21 Sup. Ct. Rep. 645.

RAMSEY COUNTY *v.* ROBERT P. LEWIS CO.

(*Supreme Court of Minnesota, Feb. 7, 1901.*)

[85 N. W. Rep. 207.]

Constitutional Law—Water Tax—Frontage Assessment.*—Sections 26, 27, c. 110, Sp. Laws 1885 (St. Paul City Charter), provides: In addition to all other powers conferred upon said board, they are authorized to and shall assess upon each and every lot in the city of St. Paul, in front of which water pipes are laid, an annual tax or assessment of 10 cents per lineal foot of the frontage of such lot or lots, and which shall be a lien upon such lot or lots, and shall be collected as hereinafter provided; whereupon it shall be the duty of the county auditor to extend the same on his rolls against the property in said statement as aforesaid, for collection, and, if not paid within the time prescribed by law, then the same shall become a lien on said real estate, and said real estate shall be subject to all the penalties and charges as property delinquent for taxes for county and state purposes. All moneys collected or paid into the treasury of Ramsey county on account of said assessment or tax shall be paid over, from time to time, to the city of St. Paul for the use of said board of water commissioners. *Held*, this statute is invalid, under the fourteenth amendment to the federal constitution, being a taking of private property under the guise of taxation without just compensation, and without due process of law.

(Syllabus by the Court.)

Case certified from district court, Ramsey county.; Edwin A. Jaggard, Judge.

Action by the county of Ramsey against the Robert P. Lewis Company. Question certified to the supreme court on judgment for plaintiff. Judgment modified.

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*See *note* collecting cases, 3 Mun. Corp. Cas. 652; *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1.

Ramsey County *v.* Robert P. Lewis Co

H. E. Bigelow, F. H. Griggs, and James E. Markham, for plaintiff.

Daniel W. Doty, for defendant.

LEWIS, J. In the matter of the proceedings to enforce the delinquent taxes upon real estate within the county of Ramsey for the year 1898, the trial court certified to this court for decision the following question: (1) Are sections 26, 27, c. 110, Sp. Laws 1885, providing for the assessment for water pipes in the city of St. Paul, and the assessment made thereunder against the defendant's land in this action, in violation of the constitution of the United States? (2) Is said law and said assessment void, under section 27, art. 4, of the constitution of Minnesota? (3) And, if said law is valid, then did the district court err in computing the frontage of the defendant's land? Section 26 of the St. Paul city charter reads as follows: "In addition to all other powers conferred upon said board they are authorized to, and shall assess upon each and every lot in the city of St. Paul in front of which water pipes are laid an annual tax or assessment of ten (10) cents per lineal foot of the frontage of such lot or lots, and which shall be a lien on such lot or lots, and shall be collected as hereinafter provided." Section 27 provides that the tax be collected and enforced in connection with and under the same general provisions applicable to the collection and enforcement of general taxes. These sections were presumably enacted with reference to certain provisions in section 1, art. 9, of the state constitution, which authorizes such a front-foot tax, without regard to benefits or valuation, in cities with a population of 5,000 or more. It appears from the record that the "lot" in question consisted of 65 acres of unplatted land located in a suburban part of the city of St. Paul. The land was in a thinly-settled part; was used for pasturage purposes; was bounded on the west by a public highway called Dale street, for a distance of 2,340 feet, and on the south by Front street, for a distance of 630 feet. A water conduit from the water works into the city was laid on Dale street in front of this property, and a water pipe on Front street. The tax levied by the board of water commissioners according to this frontage was sustained by the trial court. In a former appeal by this appellant in proceedings with reference to a similar tax for a previous year upon the same land, it was held that the provisions of the city charter referred to were not in conflict with the state constitution as to equality of taxation, and that the method adopted by the commissioners for computing the frontage was a proper one. Ramsey County v. Robert P. Lewis Co. (Minn.) 75 N. W. 108. We are therefore not required to review that question here. And as to the second point certified, in view of the conclusion we have reached on the first question, it will not be considered, and we will confine our attention to the first proposition, which was not discussed nor involved in the former cases.

So far as we are aware, the bearing of the federal constitution upon the legislative power with respect to assessments for local improvements has never been presented to this court for consideration. Prior to the appearance of the case of Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, perhaps the trend of the decisions in this country was in support of the theory that the legislative power in respect to special assessments was practically unlimited, and since that case was decided the state courts have not been agreed as to its scope and meaning. Probably no decision emanating from the supreme federal court for many years has been so sweeping, and at the same time so imperfectly understood and applied. We shall not attempt here a review of the facts upon which the decision was based. To be thoroughly comprehended, it must be carefully read, and all its bearings considered in the light of the authorities cited in its support. We shall content ourselves with stating, as we understand them, the final propositions of law as there declared and adopted, and then consider whether they are applicable and controlling in the case before us. They are as follows: First. Upon the ground that abutting property may be specially and peculiarly benefited, special assessments may be levied upon such property to meet the cost of building highways, sewers, and like public improvements of a local nature. The principle which justifies such assessments is that the property is specially and peculiarly benefited, and that the owner receives in that form the value of what he gives in the form of the assessment. Second. Under the fourteenth amendment of the federal constitution, "the exaction from private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." Third. Where the principle of assessment adopted by the legislature is arbitrary and without reference to benefits, and without reference to a just and equal proportion and distribution of the burden, no provision having been made for a hearing or review, the act is illegal and void, and it is unnecessary for the owner to tender the amount of the conceded benefits as a condition for obtaining relief.

It is fundamental that, in the absence of constitutional limitations, the exercise of the taxing power rests exclusively in the legislative discretion. The first and second propositions above stated are not new principles of law, and are not declared as such in Village of Norwood v. Baker. The cases cited and reviewed show that the court was careful to lay the foundation for its conclusion that the legislative power in respect to local assessments is not absolute, but is confined within certain limits. That it was the intention of the court to lay down a rule of law broad enough to embrace the logic and reasoning of the discussion seems to us indisputable. It

cannot be that the court's conclusions were intended to be limited to a technical construction of the Ohio statute, as intimated in Webster v. City of Fargo (N. D.) 82 N. W. 732, and Cass Farm Co. v. City of Detroit (Mich.) 83 N. W. 108, and in Heman v. Allen (Mo. Sup.) 57 S. W. 559. The principle involved was not necessarily confined to "street-opening" cases. The same principle was recognized by the court as applicable to all classes of local public improvements, whether in the opening, grading, and paving of a street, or in the construction of a sewer or the laying of a water main. This appears from the scope of the investigation and the nature of the cases reviewed. That the court intended to give voice to a general principle, and not to a narrow construction, is further evident from the language with which the opinion closes: "The judgment of the circuit court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered." That the decision rested upon the doctrine that there was a limit to the legislative power, as defined in the third proposition above stated, appears from the fact that the dissenting opinion is based upon a denial of the soundness of such conclusion. That such was the scope and effect of the decision has been declared by the following courts: Loeb v. Trustees (C. C.) 91 Fed. 37; Fay v. City of Springfield (C. C.) 94 Fed. 409, a street-paving case, where this language is found: "Equality is equity, and the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited does not depend alone upon the state constitution exacting equal taxation, but has 'its foundation in those elementary principles of equity and justice which lie at the root of the social compact' (In re Canal St., 11 Wend. 154–156); and he can, therefore, invoke for its security and protection the federal constitution, which inhibits not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the state the power to deny within its jurisdiction the equal protection of the laws." See, also, Charles v. City of Marion (C. C.) 98 Fed. 166, 100 Fed. 538; Lyon v. Town of Tonawanda (C. C.) 98 Fed. 361,—both street-improvement cases. Some of the state courts have been impressed with the decision under consideration, and have applied its doctrine. Sears v. Commissioners, 173 Mass. 350, 53 N. E. 876. In Hutcheson v. Storrie (Tex. Sup.) 51 S. W. 848, it was held distinctly, on the authority of Village of Norwood v. Baker, that a statute was void which conferred on municipal authorities power to assess property for a local

improvement without giving the property owner an opportunity to be heard on the question of benefits; and it was further held that the property owner might contest the validity of such invalid assessment, without regard to the actual amount of the benefits.

Before passing to a consideration of the particular statute involved in this appeal, it will be well to refer to the expressions of this court upon the subject of such special assessments. In the early case of Rogers v. City of St. Paul, 22 Minn. 494, the then charter of St. Paul was attacked on the ground that it was in violation of the state constitution as to equality of taxation, because it did not protect the owner from an assessment in excess of the benefits conferred by the improvement. The opinion by Justice Berry states that the principle of local assessments is that the special benefits which will accrue to a property owner from a proposed local improvement will be, at least, equal to the tax assessed upon his property on account of such improvement. The charter was sustained upon the ground that the question was delegated to the common council, who were empowered in their discretion to assess the benefits. And it was further held that when so assessed the result was final and conclusive, unless impeached for fraud or mistake. In State v. District Court of Hennepin Co., 33 Minn. 235, 22 N. W. 625, the court had under consideration the constitutionality of the act which provided for the assessment of property benefited by the acquisition of lands for public parks. In sustaining the act as constitutional, and referring specially to the amendment as to an assessment for local improvements upon the property fronting upon such improvements, the court say, Justice Dickinson writing the opinion: "Neither from the circumstances under which the amendment was adopted, nor from its language, is it considered that its purpose was to wholly abrogate, in respect to such assessments, the requirement that all taxes * * * shall be as nearly equal as may be, although the basis of assessment, by which equality of apportionment should be sought to be attained, is changed, and the legislature is invested with a discretion to determine the manner in which assessments shall be made. Noonan v. City of Stillwater (Minn.) 22 N. W. 444. * * * It must still be regarded as the constitutional duty of the legislature to frame its enactments with regard to the principle of equality, and a clear disregard of that requirement would affect the validity of legislative action. But where the legislative discretion has been actually exercised, and a law framed which, in its judgment, is calculated to effect an equal apportionment of the burden of assessment upon the principle of benefits conferred, such legislation cannot be set aside by the courts merely because they may deem the law inexpedient, or not well devised for the purpose of securing in the highest degree equality in the apportionment of assessments. It is not

enough to warrant the courts in declaring the law to be invalid that they may consider that the law may actually fail to accomplish the purpose of equal and just assessment. It should at least be apparent that the law is framed upon a plan or principle not calculated to result in equality of apportionment, or that in its operation, when carried into effect with honesty, and in the exercise of sound judgment on the part of those who are to execute its provisons, it will produce such gross inequality as cannot be deemed, in a just sense, an apportioning as nearly as may be of the burden, before courts can interfere and declare the enactment void." In State v. Reis, 38 Minn. 371, 38 N. W. 97, in sustaining the "Street Sprinkling Act," speaking through Justice Mitchell, the court defined the power of the legislature in reference to special assessments as follows: "First, it must be levied for a public purpose, for the power of taxation can be exercised for none other; second, the property on which it is assessed must be peculiarly and specially benefited by the work for which it is levied; third, that it must be apportioned according to some reasonable rule, upon the basis of benefits, ascertained or implied, resulting to the property assessed." Whether these propositions were correctly applied in that case we need not consider. We quote them to show that the court recognized the true basis of such assessments. In State v. Judges of District Court, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122, it was held that an assessment by the board of public works under the charter of the city of Duluth was void, because the board adopted an arbitrary rule, without regard to benefits. Gilfillan, C. J., speaking for the court, says: "It is true that in such cases, whether particular property is benefited, and to what extent it is benefited, must be left to those whose duty it is to make the assessment, and that, when they have exercised their judgment, their determination, in the absence of fraud or demonstrable mistake of fact, is conclusive. But they must exercise their judgment, and if it appears that they have not done so, but have substituted an arbitrary, inflexible rule instead of their judgment, their work cannot stand." In that case the board of public works assessed property according to a fixed rule, according to distance and area, without reference to how the respective lots might be affected by the improvement. To the same effect see State v. Brill, 58 Minn. 152, 59 N. W. 989. See, also, State v. District Court of Ramsey Co., 68 Minn. 242, 71 N. W. 27. In the case of City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117, the question of jurisdiction in special assessment proceedings for a local improvement being under consideration, the court say (Mitchell, J.): "The one essential to due process of law, in the exercise of the power of taxation, is that at some stage of the proceedings the parties concerned shall have notice and an opportunity to interpose any defense they may have as to either the validity or amount of the tax." In that case the

assessment was sustained upon the ground that the owner had notice and an opportunity to be heard.

In all the cases involving the question of local assessment for public improvements which have been before this court, the statutes under consideration provided for the two essential elements: First, consideration and determination by some properly selected body of the benefits to accrue by the improvements; and, second, suitable notice to the owner of the property, and an opportunity to be heard on the question. And from the reference to those cases above made it will be seen that although the court has held that the legislature may delegate its power to make such assessments to the various bodies connected with municipal governments, and that the action of such delegated body in reference thereto is final, except in case of fraud or demonstrable mistake of fact, the whole trend of the discussion has centered around those two safeguards of the property owner. And there can be no question that, if any of the statutes before the court had failed to provide a proper method of estimating the benefits as a basis for the assessment and proper opportunity to the owner to be heard thereon, the court would have declared them prohibited by the state constitution as to equality of taxation, notwithstanding the amendment to section 1, art. 9, authorizing assessments for local improvements upon the property fronting upon such improvements. In the recent case of State v. Ramsey Co. District Court (Minn.) 83 N. W. 183, the powers and duties of the board of public works under provisions of the St. Paul charter were considered. The board had assessed the amount of the cost of paving a street upon the property fronting thereon, and found that each lot was benefited equally per front foot. Following the previous decisions of this court, it was held that the action of the board was final, inasmuch as it appeared that the members of the board had exercised their discretion in arriving at such conclusion. In the closing part of the opinion reference is made to the case of Village of Norwood v. Baker, with the statement that it was not applicable to the case before the court.

Taking up, now, the act which is called in question, we find, from sections 26, 27, St. Paul Charter, supra: First. That no distinction is made in the class or kinds of water pipes; whether principal feed mains or branch supply pipes, all kinds, of whatever description, being subject to the tax. Second. Each lot in the city of St. Paul, no matter what its location or value or use, whether improved or unimproved, whether large or small, whether in the semicountry or in the city, whether adapted and used for pasturage or a business block,—each "lot" is treated in the same manner, and subject to the same tax, according to its lineal foot frontage. Third. The tax is not for one year or any specified time, but is to be levied annually, for all time, and is made obligatory on the

board of public works. Fourth. This tax is not levied for any particular purpose. When collected, it is to be paid over to the city of St. Paul, for the use of the board of water commissioners; but the law is silent as to whether it is to be expended in repairing the main in front of the lots upon which the tax is levied, or to pay for money advanced by the board of water commissioners for the original construction of the main in front of the lots assessed, or whether it is to be used in payment of the current expenses of the board. Fifth. There is no provision for a hearing upon the question as to whether this tax is equitably distributed, or whether the property so assessed is benefited thereby. If the amount so assessed is not paid within the time prescribed by law, then this shall become a lien on said real estate, and such real estate shall be sold, as in other cases of delinquent taxes. At no stage of the proceedings is there a hearing or consideration by any lawfully constituted body on the question of the benefits to accrue to the property so assessed, nor is there provided any notice to or opportunity for the lot owner to be heard on the question of benefits. So far as the amount of the tax is concerned, it is specifically fixed, and the owner has no authority, under the provisions of section 1588, Gen. St. 1894, to call in question the amount of the tax, and a consideration of the equality, proportion, and benefits is necessarily excluded. In this case the owner of the property answered in the regular tax proceedings, and put in issue the question of benefits, and the court received evidence upon that point, and found that the property was not specially benefited by the laying of such water pipes. Counsel for the state claim that the court had no jurisdiction to that extent, and no authority to make such finding; that the tax was made specific by the act, and was not subject to review. As already stated, such is our view of the statute and the law, and the finding of the court is immaterial in the disposition of the matter before us.

Applying, now, the test as announced in Village of Norwood v. Baker to those sections of the charter above noted, must they stand or fall? In our opinion, they must fall. To stand against such test, having refused in this instance to delegate its powers to the municipal authorities as in other cases, and reserving to itself the imposition of the tax, it must appear from the act itself that the legislature exercised its judgment upon those questions which form the fundamental basis of the assessment. No valid tax could be levied for such purpose, except upon the theory that the property was by so much increased in value. In fixing this arbitrary amount to be applied in all cases, under all conditions, for an indefinite time, without opportunity for a hearing or review, is it not self-evident that the legislature did not consider the question of benefits at all? To our mind, the act is so drastic and arbitrary as to show upon its face a complete failure to ex-

ercise any judgment whatever upon that question. That a tract of farming land is benefited at all by the fact that a city water conduit is laid in the highway adjoining it is on its face a doubtful proposition. That such tract is equally benefited, according to frontage, with improved city property, is on its face absurd. Is a lot worth $200 benefited to the same degree as a lot worth $5,000, or is a vacant lot of equal frontage in the suburbs benefited to the same degree as a tenement block in the city proper? Again, such a tax results in the grossest inequality. The money collected is turned over to the water commissioners, and is presumably applied to a reduction of the annual cost of maintaining the water system. By so much would be reduced the cost of water to the consumers, and the landowner, who may have no use whatever for the water, is compelled to bear part of the cost to those who have.

Without dwelling upon the other arbitrary features of the statute, some notice should be given to the claim of the state that this law is within the doctrine of Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, and Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; that is, the legislature has prescribed a certain district within which it has authority to levy arbitrarily assessments to meet the cost of the improvement. It is true that the legislature may cut out a district, and levy the cost of certain improvements therein; but it is stated in Spencer v. Merchant: "In determining what lands are benefited, the legislature may avail itself of such information as it deems sufficient, either through committees or by adopting as its own the conclusions of others. * * * The question of special benefits, and the property to which it extends, is, of necessity, a question of fact, and, when the legislature determines it in a case within its general power, its decision must, of course, be final. * * * We are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits." The court there recognized the principle that there was a limit to the legislative power. The decision in Parsons v. District of Columbia rests upon the theory that the fourteenth amendment does not apply to the national government, and that the power of congress is practically unlimited as to taxation within the District of Columbia.

It may be granted, then, that, when the legislative judgment is properly exercised, the legislature may provide for a public improvement, as the construction of a highway or bridge, which naturally would be specially beneficial to some certain community, and may charge the cost and maintenance of the same upon the property of a certain defined district. But the provisions of the city charter make no attempt at such a purpose. This tax of 10 cents per foot on all pipes, present and future, has no reference to the adoption of, or construction of, a system of waterworks for the property

owners along the line of the pipe. The district, if any be defined, is the city of St. Paul, and the beneficiaries are the inhabitants thereof.

The stake driven by the decision in Village of Norwood v. Baker is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final, without regard to its justice. It is to be hoped that the highest court of the land has spoken finally, and will not recede from its position. For the reason that the statute in question embraces an arbitrary system of taxation, without regard to benefits, provides for no method of determining the question of benefits, and no opportunity to be heard in reference thereto, and for the reason that from the face of the act it appears that the legislature, in its adoption and passage, did not consider or take into account the benefits to accrue to the property upon which such assessment was levied, we hold that the statute is invalid, because it is, in effect, a taking of private property, under the guise of taxation, without just compensation, and without due process of law. The cause is remanded, with directions to the court to modify its order for judgment by deducting the amount of water-frontage tax.

MAYOR, ETC., OF CITY OF BALTIMORE *v.* STEWART *et al.*

(*Court of Appeals of Maryland, Jan. 23, 1901.*)

[48 Atl. Rep. 165.]

City Ordinance—Validity—Title.—The title of Baltimore City Ordinance No. 50 of 1900, authorizing the repaving of a street, declares that the paving shall be done with asphalt, while the body of the ordinance contains a proviso permitting the use of vitrified brick in lieu of asphalt in the gutters and on such other portions of the street as, in the judgment of the city engineer, shall be necessary or desirable. *Held*, that the title does not violate City Charter (Acts 1898, c. 123) § 221, declaring that the subject of every ordinance shall be described in its title, since matters of detail need not be specified.

Same—City Council—Delegation of Authority.—Baltimore City Ordinance No. 50 of 1900, authorizing the repaving of a street, and declaring that the paving shall be done with asphalt, but permitting the use of vitrified brick in lieu of asphalt in the gutters and on such other portions of the street as, in the judgment of the city engineer, shall be necessary, is not invalid as delegating to him the power belonging to the city council, to determine what material shall be used.

Paving Street—Discretion of Council—Review by Courts.—The exercise of the discretion vested in the city council in determining the necessity of repaving a street at the expense of abutting lot owners cannot be reviewed by the courts in the absence of proof of fraud or manifest invasion of private rights.

Local Assessment—Front-Foot Rule*—Opportunity to Contest.—It is no objection to the validity of an ordinance authorizing the repaving of

*See *note* collecting cases, 3 Mun. Corp. Cas. 652; *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1.

Mayor, etc., of City of Baltimore *v.* Stewart

a street that the cost is apportioned by the front-foot rule, when all parties interested have had ample opportunity to contest the adoption of the rule before the passage of the ordinance.

Cross appeals from Baltimore city court.

Action by Alice Gerry Stewart and her husband against the mayor and city council of the city of Baltimore. From a judgment quashing certain proceedings relating to a street improvement, and refusing to declare invalid an ordinance authorizing the improvement, both parties appeal. Reversed in part.

Argued before McSHERRY, C. J., and BRISCOE, JONES, PEARCE, BOYD, FOWLER, and SCHMUCKER, JJ.

Wm. Pinkney Whyte and Charles W. Field, for appellant.
Stewart & Farber, for appellees.

McSHERRY, C. J. There are two appeals in this record. One was taken by the mayor and city council of Baltimore from a judgment of the Baltimore city court quashing certain proceedings of the city engineer in relation to the proposed paving of St. Paul street. The other was entered by Alice Gerry Stewart and David Stewart from a judgment of the same court refusing to declare invalid an ordinance directing St. Paul street to be paved. Practically the same controlling question lies at the foundation of each case, though there are, in addition, minor inquiries suggested as applicable to the second which do not seem to have been specifically ruled on below. One opinion, however, will be sufficient to dispose of both appeals. The proceedings of the city engineer were quashed upon one of the grounds which Mr. and Mrs. Stewart rely on to invalidate the ordinance. If there was error in quashing these proceedings on that ground, then there was no error in refusing on the same ground to strike down the ordinance. So we will proceed at once to inquire whether the judgment from which the city appealed should be affirmed.

By Ordinance No. 50 of 1900, passed pursuant to the general paving ordinance contained in article 48 of the Baltimore City Code of 1893, provision was made for the paving of St. Paul street between Twenty-Fifth and Thirtieth streets. After the decision by this court of the case of Ulman v. Mayor, etc., 72 Md. 587, 20 Atl. 141, 11 L. R. A. 224, wherein it was held the assessments levied upon the owners of abutting property to pay for the paving of streets were invalid if levied without notice to the persons affected, or without an opportunity afforded to them to be heard, the mayor and city council provided by a general ordinance an elaborate plan of procedure to be followed thereafter whenever street paving was to be done. Adequate provision was made for giving ample notice to every individual interested in the subject, or who might become chargeable with any part of the cost of the improvement; and the notices required to be given were: First, as to the pendency of an ordinance providing for the

paving of a particular street; secondly, as to the apportionment of the cost of the paving; and, thirdly, as to the right of each interested party to appeal from the findings of the city engineer to the Baltimore city court. The first of these notices is required to be given through the press after an ordinance has been introduced, and before it has been acted on by the city council; and the object of it is to warn all persons who may be affected by the measure, should it be adopted, to appear before the joint standing committee on highways, and there contest the passage of the ordinance, if they desire to do so. The second notice, also given through the press, is issued by the city engineer, and warns all persons that they may appear before him on a designated day and then and there controvert the apportionments made by him; while the third public notice is given by the city register, and informs all persons interested in the paving of the particular street that they may appeal within 30 days from the apportionment made by the city engineer to the Baltimore city court, where the questions presented by the appeal can be tried by a jury, if a trial by jury be claimed. These provisions of the general ordinance contained in article 48 of the city Code gratify all the requirements as to notice and hearing which in Ulman's Case were said to be necessary to give validity to the assessment against an individual for the cost of paving a public thoroughfare. Each proprietor fronting on any street to be paved is thus afforded an opportunity to litigate the passage of an ordinance providing for the paving of that street. He is also given a hearing before the city engineer upon the question as to whether the amount assessed against him for the improvement is excessive or erroneous, and he is finally given an appeal to a court of law, where the same question may be determined by a jury. "If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed on his land, there is no taking of his property without due process of law." Ulman v. Mayor, etc., 72 Md. 593, 20 Atl. 142, 11 L. R. A. 224; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Paulsen v. City of Portland, 149 U. S. 41, 13 Sup. Ct. 754, 37 L. Ed. 41.

We gather from the argument and the record that the specific ground upon which the proceedings of the city engineer were quashed was that the title of Ordinance No. 50 of 1900 declared that the paving was to be done with sheet asphalt, while the body of the ordinance contains a proviso permitting the use of vitrified bricks in lieu of asphalt in the gutters and upon such other portions of the street as, in the judgment of the city engineer, shall be necessary or desirable. The foundation of this objection is twofold: First, that the title of the ordinance is misleading, in this: that the ordinance embraced a subject not disclosed by the title; secondly, that the ordinance left to the discretion of the city engineer the

selection of material with which the paving was to be done, whereas that was a matter to be determined solely by the city council. When it is proposed to pave a particular street, and an ordinance has been introduced to provide for doing the work, section 61a, art. 48, of the City Code, requires public notice to be given "of the introduction of said ordinance, and that any and all persons interested therein will be heard upon any matter relating thereto by the * * * joint standing committee on highways, at the time and place to be designated in said notice." The City Code does not require the provisions of the particular paving ordinance to be published, but simply directs notice of the fact that an ordinance to pave a designated street has been introduced. Upon turning to the record, it will be seen that the notice which was in fact given reads in part as follows: "Pursuant to the provisions of section 61a, art. 48, of the Baltimore City Code of 1893, by order of the joint standing committee on highways, notice is hereby given to all persons interested therein that an ordinance has been introduced into the city council and referred to the joint standing committee on highways, before which committee it is now pending, the title of which is as follows: 'An ordinance to provide for the grading and paving with sheet asphalt and curbing all that portion of Saint Paul street, from the north side of Twenty-Fifth street to the south side of Thirtieth street.'" Then comes a statement that by the provisions of the ordinance the cost of the work is to be paid for by assessing the whole expense on the abutting property in proportion to the frontage of said property, except the cost of paving the cross streets, which is to be paid by the city. The notice then proceeds: "All persons in any way interested in the subject-matter of said ordinance are hereby notified that the joint standing committee on highways will be in session at the city hall, First branch committee room, Baltimore, on Wednesday, March 21, 1900, at 3 o'clock p. m., for the purpose of considering said ordinance and giving a hearing to all those who may appear before them relative thereto." The first section of the ordinance, it will be observed, directs the city engineer to have the street graded and paved with Trinidad Lake, Alcatray, or Bermuday sheet asphalt, or other sheet asphalt which, in the opinion of the city engineer, is equally as good; it designates the kind of curbing; and then, in parentheses, occurs the proviso in relation to the use of vitrified brick for the gutters and in such other portion of the street as, in the judgment of the city engineer, may be necessary or desirable. Now, in what way is the title of the ordinance misleading, and in what manner does the title conflict with that provision of the city charter which declares that "every ordinance enacted by the city shall embrace but one subject which shall be described in its title"? Section 221, c. 123, Acts 1898. It is not pretended that the ordinance as passed is

couched in precisely the language in which it was phrased when introduced. It is altogether possible that the proviso was inserted either by the joint standing committee, or after the ordinance had been reported back from the committee to the council. It is matter of common knowledge, which every person must be assumed to be acquainted with, that bills and ordinances are open to amendment on their passage through legislative bodies, and that they are consequently apt to differ materially when finally adopted from the form in which they were when introduced. This being so, the fact that only asphalt was mentioned in the title was no reason for any one supposing that the ordinance when passed would confine the paving material strictly and exclusively to asphalt. The notice having advised all parties interested that an ordinance had been introduced, it became their duty to appear at the time and place designated, if they wished to contest the passage of the ordinance, or desired to have its provisions varied. The public notice was not intended to give information of the contents of the ordinance. It could not do so, for the reason already suggested,—that the ordinance was liable to be amended. But the object of the notice was merely to warn parties whose property abutted on the street proposed to be paved that an ordinance providing for that paving was pending. The fact that it was only a pending ordinance was notice in itself that its provisions were not necessarily or even probably final; and any one relying on its provisions as final, or depending on its title as indicating what its provisions would ultimately be, if misled at all, was misled by his own failure to heed the notice, and not by the terms of the notice as published.

But it is said the title violates the charter, in this: that the subject dealt with in the ordinance is not disclosed in the title. This provision of the charter is similar to section 29, art. 3, of the state constitution, which has been frequently under discussion in cases decided by this court. What has been ruled in those cases in reference to the constitutional provision will apply to the like clause of the charter. It never has been understood that the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the statute relates. The subject of this ordinance was the paving of St. Paul street between certain termini. The material to be used in doing the work was an incident or detail, and not the subject. When the general subject is indicated, no matters of detail need be mentioned in the title. "The primary object of the provision, undoubtedly, is to exclude all foreign, irrelevant, or discordant matter from the statute, and to confine the statute to the single subject disclosed in the title." Phinney v. Trustees, 88 Md. 636, 42 Atl. 58. The use of vitrified bricks where sheet asphalt would not be serviceable does not detract from the scheme to pave with sheet asphalt, any more than

the use of stone or iron lintels and sills would prevent a house built of brick from being properly described as a brick house. The pavement is still an asphalt pavement, though the gutters on either side of the street and the space between the car tracks be paved with some other material. The use of bricks in these places is not foreign to the purpose of the ordinance, and the proviso giving to the city engineer authority to substitute bricks for asphalt at the points indicated is neither irrelevant nor discordant matter at variance with the scheme and purpose of the ordinance as disclosed by its title. The position assumed in the court below, and sustained by the ruling appealed from, would, if finally sanctioned, absolutely preclude the use of any material except asphalt, no matter how urgent and apparent the necessity for employing in part some other paving material might be in the proper construction of the work. If, under the pretext of laying an asphalt pavement, a totally different and much more expensive one were put down, another question would be presented; but to say, when there is a title which indicates that an asphalt pavement is to be made, that a provision cannot be included by which, in the correct construction of such a pavement, bricks may be employed when necessary to give stability and permanency to the work, is to carry the doctrine far beyond any decided case; and, if accepted as the right doctrine, it would lead to the result that there could by no possibility be a valid ordinance unless every detail of its various provisions were scheduled in the title. This would convert the clause of the charter which was intended to prevent vicious legislation being cloaked under an innocent title into a snare that would practically defeat all legislation. As stated by this court in Mayor, etc., v. Reitz, 50 Md. 579, "Whilst the title must indicate the subject of the act, it need not give an abstract of its contents, nor need it mention the means and method by which the general purpose is to be accomplished." See, also, Trustees v. Manning, 72 Md. 120, 133, 19 Atl. 599.

The remaining ground relied on for quashing the proceedings of the city engineer is that the ordinance delegated to him a discretion as to whether the street should be paved with sheet asphalt or with vitrified brick. While this objection does not appear to have been passed on by the city court, it is in the record, and has been argued, and must be disposed of; and it must be disposed of, because, if well taken, it would support the judgment appealed from. The objection, as made, assumes the existence of a provision in the ordinance which is not in fact contained there. There is no delegation to the city engineer of a power or discretion to decide "whether the street shall be paved with sheet asphalt or with vitrified brick." Undoubtedly the broad and unrestricted delegation of such a power would be unlawful. The power to determine what material shall be used in paving a street is a legislative power, and cannot be transferred by the city

council to any one else; and, if the ordinance undertook to do this, it would be palpably invalid (Mayor, etc., v. Scharf, 54 Md. 521), unless the conditions exist which were present in Moale v. Mayor, etc., 61 Md. 239. What the ordinance in controversy does is quite different. The city council distinctly selected asphalt as the material with which the street was to be paved, and it merely permitted the city engineer to use vitrified bricks in lieu of asphalt in the gutters and upon such other portions of the street as, in his judgment, might be necessary or desirable. Both materials were designated by the ordinance, and the only discretion given the city engineer was with respect to the use of one in preference to the other of these two at particular places. This was a discretion not in regard to the adoption of the material with which the paving should be done, but with respect to the details of doing the work.—"a necessary discretion in a workman employed to do a work," as this court expressed it in Scharf's Case, 54 Md. 522. In the progress of the work, if it were found necessary or desirable to lay the gutters with brick, or to pave between the car tracks with them instead of with asphalt, the power to determine that it should be done had to be lodged somewhere; and placing the power in the hands of the city engineer, who is charged with the general supervision of the work, is not a delegation to him of a legislative authority to decide whether the street should be paved with sheet asphalt or with vitrified brick.

From what we have said, it will be seen that we do not concur in the conclusion reached by the learned and careful judge of the city court on the motion to quash the proceedings before the city engineer. The reasons assigned to support that motion are untenable. The proceedings should not have been quashed, and, unless there is something suggested on the other appeal to show that the ordinance itself is invalid, the judgment appealed from by the mayor and city council must be reversed. So much for the first appeal.

Now, as to the second appeal: What has been already stated is sufficient to answer the specific grounds relied on in the motion to set aside and declare Ordinance No. 50 null and void. But in addition to these specific grounds two others are asserted in the petition, which prayed an appeal from the city engineer to the Baltimore city court, and these will now be considered. They are: First, that St. Paul street is now paved with cobblestones, and needs no other pavement; and, secondly, that the apportionment of the cost by the front-foot rule is inequitable and unjust. The cases of Mayor, etc., v. Scharf, 54 Md. 513, Mayor, etc., v. Hospital, 56 Md. 27, and Alberger v. Mayor, etc., 64 Md. 6, 20 Atl. 988, fully dispose of these objections. In the case last named an ordinance directing a part of Baltimore street to be repaved with an improved pavement was involved. Among the objections to that ordinance, it was urged that there was no necessity for

having the work done. But this court thus dealt with the objection: "Under the power delegated by Acts 1874, c. 218, the discretion exercised by the city council in regard to the propriety or necessity of the improvements provided for by the ordinance cannot be controlled by the courts. It is only where the power is exceeded, or fraud is charged and shown to exist, or where there has been a manifest invasion of private rights, that the remedial and corrective power of the courts can be successfully invoked." An opposite quotation is then made from Judge Dillon's admirable work on Municipal Corporations, and the opinion proceeds: "And the application of this principle to this case effectually disposes of the contention on the part of the complainants, not only with respect to the manner of doing the work, but also with respect to the necessity or expediency of having it done. Whether there was a real necessity or a good reason for the removal of the old pavement and replacing it with Belgian blocks was a matter entirely within the discretion of the city council, and over the exercise of that discretion the courts have no power of review." 64 Md. 6, 7, 20 Atl. 990.

Now, as to the front-foot rule of apportionment of the cost of the improvement: Prior to Acts 1874, c. 218, the front-foot rule was prescribed by statute; and this had prevailed between 1782 and 1860 under various acts of assembly, and from 1860 until 1874 under sections 845, 847, art. 4, Code Pub. Loc. Laws. The repeal of these last-named sections by the act of 1874 abrogated this rule of apportionment so far forth as it had been established by legislative enactment, but no further, while the act of 1874 gave to the city an unqualified discretion to adopt by ordinance the same or any other rule by which to ascertain the amount to be paid by each abutting proprietor. Under this power the general paving ordinance established, or, rather, re-established, the front-foot rule. The validity of that rule has been recognized by this court in a number of cases since the act of 1874 was adopted. Without referring to all of them, we name Alberger's Case, supra. What was said in Ulman's Case, 72 Md. 594, of the arbitrary character of that rule, had relation to the question then before us,—not the validity of the rule, but the hardship of its application to a case where the party charged with the payment of the assessment has had no opportunity to be heard. It may be well to note, in passing, that the Ulman Case overruled previous cases only in so far as those cases had held that notice and an opportunity to be heard were unnecessary to the validity of such an ordinance; and the effect of overruling those cases was to reassert the doctrine announced in Scharf's Case, 54 Md. 499. The case at bar is different from Ulman's Case, because here ample provision was made for giving all parties interested an opportunity to be heard before the ordinance was passed, and therefore to contest the application or adaptation of the front-foot rule to this particular paving if

they saw fit to antagonize the rule. But there is another reason why the front-foot rule cannot be questioned in these proceedings. The ordinance fixing that rule was in force when the new city charter was adopted, and by section 3 of that charter (Acts 1898, c. 123) "all ordinances of the mayor and city council of Baltimore now in force and not inconsistent with this act shall be and they are hereby continued until changed or repealed"; that is, changed or repealed by the municipality. This enactment amounted to a legislative reaffirmance of the rule (Hooper v. New, 85 Md. 565, 37 Atl. 424), though the right to abrogate that rule and to substitute some other in place of it was reserved to the municipality. We cannot, therefore, say that the rule, in these circumstances, is inequitable, unlawful, or unjust.

This disposes of all the questions raised on the second appeal; and, as none of them are sufficient to invalidate the ordinance, the refusal of the court to declare it void was clearly right, and must be affirmed.

Upon the whole case, the judgment in No. 94 (the appeal of the mayor and city council) will be reversed, and that in No. 95 (the appeal of Alice Gerry Stewart and David Stewart) must be affirmed; and the record will be remanded to the court below so that a new trial may be had. And it is so ordered. Judgment in No. 94 reversed, with costs above and below, and new trial awarded. Judgment in No. 95 affirmed, with costs above and below.

ABRAHAM *et al. v.* CITY OF LOUISVILLE.

(*Court of Appeals of Kentucky, May 21, 1901.*)

[62 S. W. Rep. 1041.]

Constitutional Law—Local Improvements—Public Cisterns—Assessment According to Area of Lots.*—Ky. St. § 2833,—part of charter of cities of the first class,—authorizing the general council to construct public cisterns, "and to apportion the costs thereof exclusively against the owners of lots fronting the public ways to the middle of each square from the intersection at or near which the work shall be located according to the number of square feet in such lots, or in any other equitable mode of apportionment which the general council may prescribe by ordinance," is not unconstitutional.

GUFFY, J., dissenting.

Appeal from circuit court, Jefferson law and equity division. "Not to be officially reported."

Action by Dallas Abraham and others against the city of Louisville to recover assessments paid. Judgment for defendant, and plaintiffs appeal. Affirmed.

H. M. Lane, W. W. Thum, S. E. Sloss, and Zack Phelps, for appellants.

H. L. Stone, for appellee.

*See *note* collecting cases, 3 Mun. Corp. Cas. 652; *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1.

Schaefer *v.* Werling

HOBSON, J. The city of Louisville caused a number of cisterns to be constructed in various parts of the city by an ordinance of May 17, 1894, under sections 2833, 2834, 2839, Ky. St., and apportioned the cost as therein provided. Appellants, who are taxpayers of the city of Louisville, paid their apportionments, and then filed this action, on behalf of themselves and all other taxpayers similarly situated, to recover of the city the amounts so paid, on the ground that the city had no power to pass the ordinance, and that the statutes referred to are unconstitutional. The court below sustained a demurrer to the petition and dismissed the action.

In City of Louisville v. Osborne, 10 Bush, 226, this court sustained a similar ordinance. This decision was rendered before the adoption of the present constitution, and seems to have been acquiesced in by the legislature and the constitutional convention which framed the present constitution. It was recently reaffirmed by this court in Steam-Forge Co. v. Anderson, 57 S. W. 617; and, while we recognize the force of the able argument submitted for the appellants, we do not feel at liberty to depart from a rule long established and recognized when the constitution was adopted. Judgment affirmed.

GUFFY, J., dissenting.

SCHAEFER *v.* WERLING *et al.*

(*Supreme Court of Indiana, April 17, 1901.*)

[60 N. E. Rep. 149.]

Constitutional Law—Local Improvements—Assessment According to Frontage.*—The Barrett law (Act 1889, p. 237), permitting the cost of local improvements to be charged against abutting property according to frontage, subject to alteration by the county according to actual benefits received, is constitutional.

Appeal from circuit court, Huntington county; J. T. Cox, Judge pro tem.

Action by Julius Werling and another against Hannah Schaefer to recover the cost of a local street improvement. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. M. Sayler and B. F. Ibach, for appellant.

Will H. Hart and John Q. Cline, for appellees.

BAKER, J. As the ground for reversal appellant contends that the Barrett law is unconstitutional. The majority of the court held otherwise in Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797. On the authority of that decision, the judgment is affirmed.

*See *note* to Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652; *note* to French *v.* Barber Asphalt Pav. Co., *ante*, p. 1.

STATE *v.* PILLSBURY.

(*Supreme Court of Minnesota, Feb. 6, 1901.*)

[85 N. W. Rep. 175.]

Constitutional Law—Local Improvements—Report of City Engineer—Publication of Notice.—In the charter of the city of Minneapolis (chapter 10, § 8), relating to special improvements and assessments therefor, it is provided that when the city council shall determine to make a certain improvement, and shall designate in a general way the character and extent thereof, and the material to be used, the city engineer shall make and report to the council an estimate of the cost, and various other matters, and that a brief minute of the reception of such report shall be made and published in the record of the proceedings of the city council, which publication shall be held to be sufficient notice to all persons concerned. *Held*, that the publication provided for is sufficient notice to the property owner of the instituting of the proceedings in question; and *held*, also, that under other provisions of the same section he is given an opportunity to be heard before the council in respect to all matters involved in the proposed improvements.

Same—Same—Manner and Method of Apportionment—Benefits Received.*—The manner and method provided in the charter (chapter 10, § 8) for assessing and apportioning taxes upon abutting property where a sewer has been constructed in the street upon which such property fronts, known as the "Second Plan," cannot be sustained. The assessment and apportionment under this plan are arbitrary and unlawful. The basis which must govern in such cases, viz. that the abutting property is peculiarly and specially benefited by the improvement, and therefore benefits must be considered, is wholly ignored. These provisions are repugnant to section 13, art. 1, and section 1, art. 9, of the state constitution, and also to section 1 of the fourteenth amendment to the constitution of the United States.

Judgment upon Agreed Facts—Error.—Under the allegations of the answer and a stipulation of facts made by the parties, it is *held* that the court below was in error when it ordered, in effect, that a certain part of the assessment for the sewer in question, equal to the cost and also equal to the benefits to the property, should be excluded from the judgment.

(Syllabus by the Court.)

Case certified from district court, Hennepin county; Charles M. Pond, Judge.

Action by the state against John S. Pillsbury. Judgment for defendant, and questions certified. Remanded.

Louis A. Reed, Co. Atty., C. S. Jelley, and J. M. Pulliam, for the State.

Fred B. Snyder, for defendant.

COLLINS, J. In this proceeding plaintiff seeks to enforce the payment of taxes upon real estate becoming delinquent on the first Mondav in January, 1900. The amount sought to be collected was something over $500, and the real estate involved was certain lots in the city of Minneapolis. No defense was interposed to any portion of the tax, except the sum of $171.70, which, it appears, is the second installment of a total assessment levied against the lots for the construc-

*See Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187; French *v.* Barber Asphalt Pav. Co., *ante*, p. 1, and *note*.

tion of a sewer in the street in front thereof. It stands admitted that all proceedings for the establishment and construction of the sewer, and assessment and levy of the tax, were regular in form and strictly pursuant to the charter provisions; but the defense raises the question that said provisions are unconstitutional and void, for a number of reasons. The court below having ordered judgment for the defendant as to the sewer assessment, and to the full amount of the installment, it has certified to this court five questions, which need not be specifically mentioned as answered. It must be conceded that the assessment in question was made under the provisions of an amendment to the city charter which is Sp. Laws 1881, c. 76, found in Sp. Laws 1883, c. 3, §§ 18, 19, and known as the "Second Plan" for the construction of sewers. No particular reference need be made at this time to what is known under the charter as the "First Plan." The second relates to all sewers constructed, relaid, or extended throughout the whole city during any one season. It contemplates that at the end of the season the cost of all sewers constructed during that period shall be marshaled for the purpose of ascertaining the total or entire cost, and thereupon the council shall levy and proceed to collect from abutting property an equal sum per front foot, without regard to the valuation of such property, or the size or cost of the sewer, which sum shall not exceed $4 per lineal foot. The rate per lineal foot, not in excess of $4, is to be fixed by resolution of the council, and one-half of that rate or amount is to be levied and assessed upon property abutting upon each side of the street. When this rate is once fixed by resolution, it remains, from year to year, as such rate, until affirmatively changed by resolution of the council, or until the council decides to pursue the so-called first plan for the construction and assessment for sewers. The cost of sewers constructed in front of exempt property and across streets, and the cost of any particular sewer over and above the amount assessed, is, under the second plan, to be paid out of what is known as the "Permanent Improvement Fund." It will be seen that under this plan the council is authorized to assess against abutting property a flat rate per lineal foot, without regard to actual benefits or to the cost of construction, for which the assessment is made. The rate may be more or less than the benefits or the cost. If the amount of the assessment exceeds the actual cost, the surplus, when collected, goes, we infer, into the permanent improvement fund. If less, the deficiency in cost is paid out of this same fund. There is a general provision requiring the council, when it determines upon the laying of a sewer upon any particular street or streets, which must be specifically named, to designate in a general way the character and extent of the improvement and the materials to be used. It is then made the duty of the city engineer to present a report to the council containing certain information, and, if the first

plan is being followed, an estimate of the cost and certain apportionments thereof. If the second plan is adopted, the report need not contain this estimate or apportionment. Then follows this provision, and it is the only one in the charter in reference to notice to interested parties: "A brief minute of the reception of such report shall be made and published in the record of the proceedings of the city council, which shall be held to be sufficient notice to all persons concerned." It is then prescribed that such report shall lay over, without any assessment being made, until the next regular meeting of the council, which shall occur at least one week after its reception. The city council shall then hear all persons interested in the matter of such proposed construction who may desire to be heard, and after this hearing the council may adhere to its resolution, or it may modify its character, or it may abandon the improvement altogether. In this particular case the report of the engineer was made in strict compliance with the requirements of the charter, it was received by the city council at its regular meeting, a minute was made in the records and properly published in full, and no further steps were taken until the council meeting, at which a hearing is granted to all parties concerned; and at this meeting the original resolution was adhered to, or, to speak more properly, it was not departed from. And, as before stated, it stands admitted that the requirements of the charter were faithfully and technically observed. The assessment roll was then transferred to the county auditor, the amount of the assessment extended upon his books with other taxes against the defendant's lots, and thereafter the proceedings for the collection and enforcement thereof were under and in accordance with the general laws of the state; the answer interposed by defendant and the subsequent proceedings being under such general laws.

Having thus given an outline of the proceedings under the charter in all cases in which the second plan has been adopted, we reach the initial question in this case; the defendant's contention being that this method of procedure deprives the owner of his property without due process of law, because there is no sufficient provision in the charter for notice to him of the contemplated improvement, and no opportunity afforded him to be heard. He is thus, argues counsel, deprived of his right to be heard before the improvement is made, and the assessment, which may exceed the cost and also the benefits, is levied. But under the constitution (amendatory proviso of 1869, art. 9, § 1) the legislature may prescribe the manner in which assessments for local improvements may be made upon property fronting thereon, or upon benefited property, or upon both; and the provision necessarily confers upon the legislature the power to prescribe the kind of notice, and the manner or method of service upon the lot owners. The charter expressly provides that a brief minute of the reception

of the report of the engineer to the council, made and published in the proceedings of that body, shall be sufficient notice to all persons concerned. This publication is notice to all of the commencement of the proceedings, and is sufficient for the purpose, under the decisions in Rogers v. City of St. Paul, 22 Minn. 494; State v. Ramsey Co. Dist. Ct., 33 Minn. 295, 23 N. W. 222; Hennepin Co. v. Bartleson, 37 Minn. 343, 34 N. W. 222. And the property owner is given an opportunity to be heard before the city council, of which opportunity he had notice, not personal, to be sure, but that authorized by law,—the publication in the council proceedings of a minute of the engineer's report. The city council is made the proper tribunal to hear all objections of all persons upon all matters connected with the improvement. Any party interested has an opportunity to be heard as to the size, form, depth of sewer, and the material to be used. He may be heard upon the propriety or impropriety of building the sewer at all, and, in the judgment of the council, the original resolution may be modified as to the nature of the improvement, or the latter may be totally abandoned. Plenary power is conferred upon the council to exercise its discretion in the whole matter, after a hearing of all interested parties. In addition to what has been said in the cases cited as to the sufficiency of the prescribed notice to interested parties, we call attention to the fact that any objections to the regularity and legality of these assessment proceedings may be taken, as they have been here, by answer in the attempt to enforce the collection of taxes under the general law. As was said in the Bartleson Case upon this same point: "Any objections of the landowner to the regularity or legality of the proceedings may be taken by him by answer, as in other cases under the general law. * * * He may show fraud, mistake, want of authority to support the assessment, or a failure to comply with the provisions of the statute. His constitutional rights are therefore fully protected." See, also, City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763. The defendant's right to be heard before being deprived of his property was adequately protected. He was given an opportunity to be heard under the charter provision before referred to, and he was also given a like opportunity when he answered under the general tax law. It follows from what has been said that we are unable to agree with the conclusion of the learned court below, in effect, that the property owner is deprived of his constitutional right to have due notice of a proceeding which might result in devesting him of his property.

The next inquiry in this case is as to the constitutionality of the charter provisions—the second plan—under which the sewer in question was built, it being claimed that for a number of reasons they are opposed to both state and federal constitutions. It will be remembered that prior to 1869 sec-

tion 1, art. 9, of our state constitution did not contain a special provision in regard to assessments for local improvements. The original provision was that "all taxes to be raised in the state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state." In Stinson v. Smith, 8 Minn. 366, this original provision was construed, and it was held that an assessment for grading streets must be apportioned upon the basis of the valuation of the property upon which the assessment was made, and that any act of the legislature authorizing such an assessment upon any other basis was repugnant thereto. This decision led to the adoption of the 1869 amendment before mentioned, whereby the basis of assessment for local improvements was changed, and it was no longer necessary to base such assessments with strict regard to the valuation of the premises on which the assessment was laid. But in Noonan v. City of Stillwater, 33 Minn. 198, 22 N. W. 444, it was expressly declared that in adopting this amendment the people did not intend to reject or modify, in respect to taxes of this class, so just and reasonable a principle as that they "shall be as nearly equal as may be"; and it was said that, whatever basis of apportionment (assessment) may be adopted, it must include the idea of equality. The gist of this decision is that, while the amendment empowered the legislature to apportion and assess according to street frontage, it does not authorize an assessment on that plan wholly disregarding the fundamental rule upon which special assessments are made, namely, that of benefits. This same general doctrine has been approved a number of times since, and it is clear that while the legislature may authorize municipal corporations to assess for local improvements upon property fronting on the improvement, or on property benefited, or both, in such a manner as it may prescribe, such legislation must not authorize a departure from, or a variation of, the previously existing rule of uniformity and equality. No plan can be adopted which will result in gross inequality of taxation. The burden must be apportioned as uniformly and as equally as may be. The legislature cannot fix, or authorize the governing body of a municipality to fix, an arbitrary basis for an assessment to be imposed upon property without regard to benefits. If this be done, the principle which justifies special assessments on abutting property, namely, that it is thereby specially and peculiarly benefited, is wholly ignored; the result being that under the guise of taxation the owner is deprived of his property without just compensation, and for the use of the public. As stated in Cooley, Tax'n (2d Ed.) 661: "There can be no justification for any proceeding which charges the land with an assessment greater than the benefit. It is a plain case of appropriating private property to public uses without compensation." This same proposition is tersely and pointedly put in a Missouri case in the following words:

"A law which would attempt to make one person, or a given number of persons, under the guise of a local assessment, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." McCormack v. Patchin, 53 Mo. 36. But we need not dwell further upon the powers of a legislature to determine, or to confer authority to determine, the basis upon which assessments for local improvements must be made, or the manner and method of apportionment. It has been discussed this term in the case of Ramsey Co. v. Robert P. Lewis Co. (opinion yet officially unpublished) 85 N. W. —, in which Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, was considered and regarded as controlling. We have simply to apply the well-settled rules to the case at bar,—in fact, to all cases where the second plan of assessment has been followed, the details of which we have hereinbefore stated. Twelve years prior to the time this particular improvement was determined upon, a resolution was adopted by the council, in which was fixed the amount of assessment to be made upon property fronting on streets in which sewers had been constructed that year, to wit, $3 per lineal foot; and this resolution and the amount so fixed continued in force, under the charter, until another resolution or another amount or another plan of apportionment should be adopted. This resolution, with all of its details, was adopted, so far as shown, without regard to any benefits which might accrue to the assessed property. It was followed and made the basis of the assessment against defendant's property without the slightest regard to the benefits to such property arising out of the improvement. No consideration was given to the fact that the cost of this particular sewer was but $1.86 per lineal foot, and that the assessment was 60 per cent. in excess of this cost. The charter contains no provision whatever under which benefits to the property against which an assessment is ordered may be ascertained or even considered. The council arbitrarily, and many years in advance, determined and declared what amount should be assessed against defendant's property whenever a sewer should be constructed in the street upon which it fronted. The charter authorizes this method, and none other, except, at the option of the council, the first plan may be adopted. Of course, the amount to be assessed per lineal foot of frontage might be increased, not to exceed a total of $4 per foot, or might be decreased, at the will of the council, but at no time was this body obliged to consider or ascertain benefits. No plan of assessment can be upheld which will permit such an outrageous departure from the principle of uniformity and equality in taxation embodied in the constitution as will this one now being considered.

There are other provisions of the charter to which attention has been called by counsel. One is to the effect that, when the total cost of any improvement for which special assess-

ments have been levied shall be less than 90 per cent. of the total special assessments levied or collected for the same, the city council may refund out of the permanent improvement fund to such property owners as have paid their assessments three-fourths of their proportionate share of the excess of such assessments so collected, over the total cost of such improvements. Exactly what this means is not very clear, and whether it could be made to apply to assessments made under the second plan is in great doubt. But, more than this, there are several reasons why this provision is not only inoperative, but insufficient as a means of redress to the person whose property has been assessed. But two need be mentioned: He is obliged to pay the illegal tax before he can have any standing at all with the council, and then refundment of the excess is optional with that body. It may or may not return the "proportionate share of the excess," whatever that means. There is a total absence of any provision under which the city council or the city itself can be compelled to recognize the principle which governs in cases of assessments for local improvements, and to refund any sum whatever to the property owner. In Norwood v. Baker, supra, is found the following language, which is extremely pertinent, in this connection, to the present case: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." The manner and method of procedure provided for in the city charter known as the "Second Plan" is obnoxious to both the state and federal constitutions.

This brings us to the final question certified up. In his answer defendant alleged, among other things, that the actual share of the cost of the sewer in question assessable and apportionable upon his lots was a stated sum, and, further, that he was entitled to have credited on the amount of taxes claimed to be due the difference between such share of the cost and the amount assessed, with interest. Judgment to this effect was demanded if the trial court failed to declare the sewer tax wholly null and void. At the trial there was a stipulation of facts in which defendant candidly admitted that his property was benefited to the amount of one-half of the actual cost per lineal foot of the sewer in front thereof, and further stipulated that he had offered to pay to the proper authorities all of the taxes assessed and claimed by the state, except the excess thereof over and above the actual cost of the sewer, which offer was refused. In legal effect, the

allegations in the answer and the facts stipulated on the trial, above alluded to, amounted to an offer to pay a sum equal in amount to the value of the benefits actually conferred; and we see no reason why the offer so fairly and honorably made should have been rejected, as it was in the court below, the conclusion being that no portion of the sewer tax should be included in the judgment.

From what has been said it is evident that we hold that the provisions of the charter under which the assessment was made and the tax therefor extended upon the lists contravene and are obnoxious to section 13 of article 1, and section 1 of article 9, of the state constitution, and are also repugnant to section 1 of the fourteenth amendment to the constitution of the United States. We answer in the affirmative the certified questions numbered from 1 to 4, inclusive. And under the circumstances appearing here, and without considering the right of the state to enforce collection of a part of his assessment levied in accordance with the charter provisions in question, we also answer the fifth question in the affirmative. The case is remanded, with directions to the court below to cause an entry of judgment in accordance with these views.

THOMASON *et al. v.* CARROLL *et ux.* (S. F. 2,392.)

(*Supreme Court of California, March 11, 1901.*)

[64 Pac. Rep. 262.]

Public Improvement—Written Objection by Property Owners.*—St. 1891, p. 196, § 3, provides that the owners of a majority of the frontage of property on a proposed street improvement may make a written objection to the same, and that such objection shall be a bar for six months to any further proceedings. *Held*, that such objection not only suspends the right of the board of supervisors to make the improvements, but precludes its subsequent construction after the expiration of six months without a republication of notice of intention.

Same—Same—Certification by Clerk.—Under St. 1891, p. 196, § 3, providing that the owners of a majority of the frontage of property on a proposed street improvement may file a written objection thereto with the clerk of the city council, who shall indorse the date of filing thereon, and it shall then be a bar to any further proceedings for six months, a protest duly filed is not insufficient because the indorsement of filing thereon is not signed by the clerk; hence he is not required to certify thereto.

Same—Same—Protest Filed before Last Day of Publication.—Under St. 1891, p. 196, § 3, providing that a proposed street improvement may be suspended on the filing of objections, by a majority of the owners of property fronting thereon, within 10 days from the expiration of the time of publication of notice of intention, such protest is not invalid, as prematurely filed, because it is filed before the last day of the publication.

Judgment Based upon Irregularities—Harmless Error.—Where an erroneous finding is not made the basis of judgment rendered, it is harmless error.

Right of Protest Not Taken Away by Later Sections of Statute.—The right to protest, under St. 1891, p. 196, § 3, providing that the owners of

*See note at end of case. And see Ahern *v.* Board of Improvement, *post*, p. —; also *notes*, 3 Mun. Corp. Cas. 8, 19.

Thomason *v.* Carroll

a majority of the frontage of property on a street improvement may protest against such proposed municipal improvement, which shall suspend proceedings thereon for six months, is not affected by later provisions in the section, providing that the council may, under certain circumstances, disregard such objections.

Commissioners' decision. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by E. R. Thomason and another against John J. Carroll and wife to enforce the lien of a street-improvement assessment. From a judgment in favor of the defendants, and from an order denying a motion for a new trial, the plaintiffs appeal. Affirmed.

J. C. Bates, for appellants.

H. N. & Jabish Clement and D. H. Whittemore, for respondents.

CHIPMAN, C. Action to foreclose a street assessment lien. Defendants had judgment from which, and from the order denying motion for new trial, plaintiffs appeal.

It was admitted at the trial that the assessment, warrant, diagram, and certificate were all in due form, and that they constituted a prima facie case for plaintiffs, who are assignees of one C. F. Cormack, the contractor. The work ordered was for paving and laying granite curbs on Guerrero street, between Eighteenth and Nineteenth streets, in the city and county of San Francisco; the total frontage of the work being 1,040 feet. It was alleged in the answer "that the owners of the major portion of the frontage of the lots fronting on said proposed work filed with the clerk of said board [the supervisors] written objections to the same within 10 days after the expiration of the time of the publication and posting of the notice of the passage of the resolution of the board, declaring their intention to order said work, and said owners never petitioned to have said work done," and that the board never acquired jurisdiction to order said work. The court found the above allegations of the answer to be true, and this finding is challenged. On May 15, 1893, more than six months after the protest was filed, the board ordered the work done without republication and posting of a resolution of intention, as required by section 3, Act March 31, 1891 (St. 1891, p. 196). Such order was invalid, if there was a valid protest filed. Improvement Co. v. Babcock, 123 Cal. 205, 55 Pac. 762; Paving Co. v. Reynolds (Cal.) 62 Pac. 212. Appellants contend that the board had authority to order the work, because (1) the protest was not filed in time, and (2) it was not indorsed by the clerk. Defendants produced from the office of the clerk of the board and offered in evidence a document, with certain indorsements thereon. The document was a protest addressed to the board, dated San Francisco, October —, 1892, and purported to be signed by the owners of 658½ feet of the frontage, being more than one-half of the frontage on Guerrero street proposed to be improved. The protest had thereon the fol-

lowing indorsements: "Protest. Property owners. Against paving Guerrero St. between 18th and 19th streets, 638½ feet." "Oct. 10–92, S. C. recom. & Int. 7,721." By rubber stamp indorsed as follows: "Majority protest, which, under the law, stops further proceedings for 6 months. Oct. 27, 1892." Further indorsed as follows: "Clerk's Office. Filed Oct. 24, 1892. San Francisco. Board of Supervisors, No. 27." "Protest. Guerrero street between 18th and 19th Sts. Dated Oct. 24, 1892."

Plaintiffs objected to the evidence on the grounds: (1) That there is no evidence that the above document "was ever filed or officially indorsed by the clerk, or any one," and therefore it "did not amount to a protest, under section 3 of the street law, or have the effect to stop or bar further or any proceedings, for six months or any time"; (2) there was no evidence of the genuineness of the signatures to the protest, or of any ownership of any lots fronting on the work. The objections were overruled, and plaintiffs excepted. The second ground of objection is not now urged. The only resolution of intention was adopted October 10, 1892, and was regularly posted October 14th, and regularly published, daily, the first insertion being October 17 and the last October 24, 1892.

The report of the street committee, and the action of the board thereon, appeared from the minutes of the board of October 24, 1892, as follows: "Petitions, protests, etc., were presented, received, and referred, as follows: * * * To the committee on streets, wharves, grades, and public squares, * * * protests: * * * Guerrero street, between Eighteenth and Nineteenth streets." The minutes of October 31, 1892, were read, showing as follows: "The committee on streets, * * * by Supervisor Taber, presented a report, which was received, read, and, on motion, adopted as the action of the board on the matters contained therein." The committee on streets filed their report October 31, 1892, and the minutes relating thereto read as follows: "The following protests against performance of street work, each representing a majority of the property liable for the cost of the work thereof, bar for six months any further proceedings in relation thereto, to wit: * * * Against paving, etc., Guerrero street, between 18th and 19th streets." Plaintiffs objected to this evidence, on the ground that the board did no more than "to adopt the legal opinion of the committee as to the effect of the protest, if legally and officially filed and indorsed as provided by section 3 of the general street law." The objection was overruled, and plaintiffs excepted. The foregoing constituted all the evidence in the case.

1. It is urged that the evidence fails to show any filing of a protest because the indorsements appearing on the document are not authenticated by the clerk's signature. The contention seems to be that it was the duty of the clerk to authenticate the indorsements, failing in which the evidence was

inadmissible, and proved nothing if admitted. The statute provides that the owners of a majority of the frontage of the property fronting on the proposed work "may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, (notice of street work), which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him, and such objections so delivered and indorsed shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the majority of the frontage, as aforesaid, shall meanwhile petition for the same." St. 1891, p. 196, § 3. The statute does not require the clerk to do more than indorse on the protest the date of its reception by him. He is not required to authenticate his indorsement by any certificate. If the protest were in fact filed with the clerk, his failure to indorse the date when received would not defeat its object; for the fact could be proved as any other fact, by proper evidence. When the document was deposited with the clerk for filing or indorsement, it was, in contemplation of law, filed with the board. Tregambo v. Mining Co., 57 Cal. 501. In Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337, and Warren v. Ferguson, 108 Cal. 535, 41 Pac. 417, cited by appellants, the engineer had failed to make the certificate required by the statute. But, as we have seen, no such certificate is required of the clerk. In the present case the protest was produced from the records of the board in their official custody, and showed the indorsements as above stated, and it appeared by the minutes of the board that the protest was filed October 24, 1892. We think this made sufficient proof of the facts.

2. It is also contended that the protest was prematurely filed, and was therefore ineffectual to accomplish any purpose. The point made is that the posting and publication of the "notice of street work" must have been completed, after which 10 days are given within which to file the protest. If filed after said 10 days, it is claimed to be too late, and, if before, it is too soon. The resolution was passed October 10th, was posted October 14th, and the first publication was October 17th and continued daily to and including October 24th, on which latter day the protest was filed. Section 3 of the act requires the notice "to be published for six days." It was held in Warren v. Russell (Cal.) 62 Pac. 75, that the protest, not having been filed within the 10 days prescribed by the street law, was too late to give jurisdiction in the premises to the board of supervisors. We think, however, that the statute is intended to prescribe the time within which the protest shall be filed, or, in other words, beyond which it cannot be made, and that the protest may be filed at any time after publication has been made, although not yet completed. The object of the law is to apprize the owners of the lots by the

notice of the contemplated improvement, and we can see no reason for holding that the lot owners may not file their objections as soon as the notice is published. There was an obvious purpose in limiting the time beyond which the owners could not object, but we can see no reason for providing that a protest must not be made until the notice has run the six full days, and we do not think the law should receive the construction contended for by appellants. The situation is not unlike that of a person holding a claim against an estate. He is required by the Code to present his claim within the time fixed by the notice to creditors (Code Civ. Proc. § 1453); but he may present it before notice to creditors is published (Janin v. Browne, 59 Cal. 37). In the case here the board received the protest on October 24th, and referred it to the street committee, and that committee acted upon it. The owners would not be heard to say they filed the protest too soon, nor can the board now be heard to dispute the binding force of their act.

3. Finding 4 recites the bringing of an action by plaintiffs' assignor against these defendants to foreclose his lien for the work mentioned in the complaint. That issue was joined, and a trial had, resulting in a judgment in favor of defendants, based upon certain irregularities in the assessment, diagram, and warrant. It is urged, and is true, that there is no evidence to support this finding. The complaint said nothing about such an action being brought, and the answer referred to it only by way of an admission, but the warrant described purported to issue December 7, 1893, while the warrant in the present action is alleged to have issued November 4, 1896, although the work was apparently the same in both instances. The answer does not purport to plead the judgment in bar, and we cannot see why mention was made of the former action either in the answer or in the finding referred to. So far as appears, however, the finding was not made, and could not have been made, the ground for the judgment, and hence there was no injury done to plaintiff by the finding.

4. It is claimed that a majority protest does not stop proceedings where the work is for only one block. Section 3, supra, reads that "the owners of a majority of the property, * * * where the same is for one block or more, may make written objections," etc. The right to protest is not affected by the later provisions in the section, where it is provided that the council may, under certain circumstances, disregard the objections. When a protest is duly filed, the council obtains jurisdiction to order the work by passing upon the legality of the protest. Section 3, supra, provides that "at the expiration of twenty days after the expiration of the time of said publication, * * * if no written objection to the work therein described has been delivered as aforesaid, by the owners of a majority of the frontage, * * * or if any written objection purporting to be signed by the owners of

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a majority of the frontage is disallowed by said council, * * * the city council shall be deemed to have acquired jurisdiction to order any of the work to be done," etc. In the case here the board declared the protest to be a bar, without which action it would have been their duty, under the act, to fix a time to hear the protest. Having treated the objections as a bar, there was no necessity for giving the owners a hearing. It is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

NOTES.

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I. CONSENT OF PROPERTY OWNERS.

The right to create liabilities or make certain improvements may be made to depend upon the vote of the people. Clark *v.* Rochester, 28 N. Y. 605; Patterson *v.* Society, etc., 4 Zabr. (24 N. J. L.) 385; Bank of Rome *v.* Rome, 18 N. Y. 38; Trustees *v.* Cherry, 8 Ohio St. 564; Burns *v.* Atchison, 2 Kan. 454 (1864); Bank *v.* Brown, 26 N. Y. 467; Hammond *v.* Haines, 25 Md. 541; R. R. Co. *v.* Com'rs, 1 Ohio St. 77; Foot *v.* Cincinnati, 11 Ohio 408 (1842); St. Louis *v.* Alexander, 23 Mo. 483; Blanding *v.* Burr, 13 Cal. 343; Simpson *v.* Com'rs, 84 N. Car. 158; Delphi *v.* Evans, 36 Ind. 90; Indianapolis *v.* Imberry, 17 Ind. 175; Baker *v.* Tobin, 40 Ind. 310; Fayssoux *v.* Dechaurand, 36 La. Ann. 547; Covington *v.* Casey, 3 Bush (Ky.) 698.

The legislature may compel a municipality to lay out and improve its streets without the consent of the property owners. People *ex rel.* McLeon *v.* Flagg, 46 N. Y. 401, 11 Am. Law Reg. (N. S.) 80.

Under charter which authorized the city board of trustees to fix the official grade of any and all streets, either upon petition from lot owners or within their own discretion, and charge the cost of the same upon the

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abutting owners, it was held that they might order any grade that they saw fit without a petition from the abutters. City of Napa *v.* Easterby (Cal.), 18 Pac. Rep. 253.

Power to pave at the expense of the property owner without his consent is special and limited, and must be exercised in strict accordance with the law. Henderson *v.* Baltimore, 8 Md. 356. Where statute requires the consent in writing of a specified majority of property holders before an improvement is ordered, it is a sufficient compliance with such statute that the specified majority sign a petition asking that the improvement be made. Jones *v.* Tonawanda, 158 N. Y. 438, 53 N. E. Rep. 280, 55 N. Y. Supp. 115.

Under Utah session laws 1890, ch. 41, consent to a public improvement, as manifested by a failure to object on the part of the property holders interested, is jurisdictional, and no assessment can be collected for an improvement made without such consent. Odgen City *v.* Armstrong, 168 U. S. 224, 18 Sup. Ct. Rep. 98.

Where the consent of the property owners is a prerequisite to the right of a city to change the grade of a street, and it makes such change without the required consent, it will be liable to abutters for all damages ensuing. Crossett *v.* Janesville, 28 Wis. 420; Dore *v.* Milwaukee, 42 Wis. 108; Hill *v.* St. Louis, 59 Mo. 412; Karst *v.* Stillwater, etc., R. Co., 22 Minn. 118; Lafayette *v.* Wortman, 107 Ind. 404; Freeland *v.* Muscatine, 9 Iowa 461.

Where a city charter requires the consent of the property owners before council can order certain improvements made, and council, without such consent, orders the work done, and ordains that it shall be a charge upon the abutting property, and that the contractor shall look to the owners of such property for his pay, and not to the city, no recovery can be had either against the city or the property owners. Leavenworth *v.* Rankin, 2 Kan. 357; Swift *v.* Williamsburg, 24 Barb. (N. Y.) 427; Goodrich *v.* Detroit, 12 Mich. 279; Johnson *v.* Com. Council, 16 Ind. 227; New Albany *v.* Sweeney, 13 Ind. 245; Moylan *v.* New Orleans, 32 La. Ann. 673.

The assent of abutters when required is jurisdictional. Henderson *v.* Baltimore, 8 Md. 352; Cowan *v.* Martin, 26 N. J. L. 594; Camden *v.* Milford, 26 N. J. L. 49; State *v.* Elizabeth, 30 N. J. L. 276; State *v.* Newark, 37 N. J. L. 415, reversing 35 N. J. L. 168; *In re* Sharp, 56 N. Y. 267, 15 Am. Rep. 415; Sharp *v.* Johnson, 4 Hill (N. Y.) 92, 11 Am. Rep. 768; Kyle *v.* Malin, 8 Ind. 34; Ely *v.* Morgan Co. Com'rs, 112 Ind. 361; Forsythe *v.* Kreuter, 100 Ind. 27; State *v.* Orange, 32 N. J. L. 49; State *v.* Hand, 31 N. J. L. 547; Baltimore *v.* Eschbach, 18 Md. 276; Wills *v.* Burnham, 20 Wis. 112; State *v.* Nelson, 57 Wis. 147; Carrington *v.* Cosey, 3 Bush 698; Burnett *v.* Sacramento, 12 Cal. 76; Lexington *v.* Hendley. 5 Bush 508; McGuinn *v.* Peri, 16 La. Ann. 326; Daniel *v.* New Orleans, 26 La. Ann. 1; Welsford *v.* Weidlein, 23 Kan. 601; Shaffer *v.* Weech, 34 Kan. 595; People *v.* Rochester, 21 Barb. 656; *In re* Royal St., 16 La. Ann. 393; Litchfield *v.* Vernon, 41 N. Y. 123; *In re* Kerrain, 62 N. Y. 457; Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177; St. Louis *v.* Clemens, 36 Mo. 467; Jefferson Co. *v.* Cowan, 54 Mo. 234; Zimmerman *v.* Snowden, 88 Mo. 218; McKee *v.* Brown, 23 La. Ann. 306; Delphi *v.* Evans, 36 Ind. 90; Moberry *v.* Jeffersonville, 38 Ind. 198; Henry *v.* Thomas, 119 Mass. 583; Turrill *v.* Grattan, 52 Cal. 97; Mulligan *v.* Smith, 59 Cal. 206; Hager *v.* Burlington, 42 Iowa 661; Richman *v.* Muscatine Co. Sup., 70 Iowa 627; James *v.* Pine Bluff, 49 Ark. 199; Zeigler *v.* Hopkins, 117 U. S. 683; Holland *v.* Baltimore, 11 Md. 186; Bouldin *v.* Baltimore, 15 Md. 18; Miller *v.* Mobile, 47 Ala. 163, 11 Am. Rep. 768; Gately *v.* Leviston, 63 Cal. 365; Dyer *v.* Miller, 58 Cal. 585; Dyer *v.* North, 44 Cal. 157; Kahn *v.* San Francisco, 79 Cal. 388; Dougherty *v.* Harrison, 54 Cal. 428; Stuart *v.* Baltimore, 7 Md. 500; Howard *v.* 1st Presbyterian Church, 18 Md. 451; Dashiell *v.* Baltimore, 45 Md. 615; Howard *v.* Bristol, 8 Bush (Ky.) 493; Case *v.* Johnson, 91 Ind. 477; Miller *v.* Mobile, 47 Ala. 163; Board of Directors *v.* Houston, 71 Ill. 318; Updike *v.* Wright, 81 Ill. 49; Sleeper *v.* Bullen, 6 Kan. 300; Sharp *v.* Speir, 4 Hill (N. Y.) 76; People *v.* Brooklyn, 71 N. Y. 495; Boyle *v.*

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Brooklyn, 71 N. Y. 1; Fass *v.* Seehawer, 60 Wis. 525; Pittsburg *v.* Walter, 69 Pa. St. 365; Jennings *v.* Moss, 4 Tex. 452; State *v.* Birkhauser (Neb. 1893), 56 N. W. Rep. 303.

II. PETITIONS.

I. **When Necessary.**—Where grade has not been officially fixed, it cannot be changed without petition of a majority of the property owners. Warren *v.* Russell, 129 Cal. 381, 62 Pac. Rep. 75.

Under Sand. & H. Dig. §§ 5321, 5322, 5332, a city of the first or second class has authority to partition the city, or a portion thereof, into improvement districts, for the purpose of securing water, gas, and electric light works, upon the petition of ten or more resident property owners. Crane *v.* City of Siloam Springs, 67 Ark. 30, 55 S. W. Rep. 955.

Under § 948 of the charter of Greater New York, where a street has once been paved and the cost paid by the abutting owners, the city cannot repave it and assess the cost to them without a petition to that effect. Pell *v.* City of New York, 65 N. Y. S. 34, 31 Misc. Rep. 664.

Under § 779 of Iowa Code, a city has authority to construct, reconstruct, or repair a permanent sidewalk and assess the cost upon the abutting owners only upon petition of the majority of the owners of the frontage. Under § 780, the city may repair a sidewalk without notice to abutting owners, and assess the cost thereof against the property. The city engineer caused a brick walk to be dug up, the foundation removed, filled in with sand, and the walk relaid, using many new bricks. *Held*, to be the laying of a new walk, and as it had not been petitioned for by the abutting owners, the cost could not be assessed against their property. Farroher *v.* City of Keokuk, 82 N. W. Rep. 773.

The presentation of a petition, signed by the owners of a majority of the frontage, is a jurisdictional prerequisite to the ordering of a public improvement to be charged upon the abutters in cities of the first class having less than 25,000 inhabitants. Henderson *v.* City of South Omaha, 82 N. W. Rep. 315.

Section 7 of Ill. Act of June 14, 1897, giving the local improvement board power to order improvements made, either with or without a petition from the interested property owners, refers only to cities of 25,000 or more inhabitants, and not to cities of less than 25,000. Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. Rep. 278; Whaples *v.* Waukegan, 179 Ill. 310, 53 N. E. Rep. 618. And as to cities of less than 25,000 the provisions of section 4 are imperative in requiring the consent of the property owners to improvements. Village of Hammond *v.* Leavitt, 181 Ill. 416, 54 N. E. Rep. 982.

Under Act of N. J., March 7, 1895, § 64, a petition in writing, signed by the owners of one-sixth of the lands abutting upon the street to be improved, is jurisdictional, and an assessment ordered upon an improvement made without such petition, is void. State *v.* Stockton, 61 N. J. L. 520, 39 Atl. Rep. 921. So also, under Comp. Stat. Neb. 1887, ch. 12a, § 69; Leavitt *v.* Bell, 55 Neb. 57, 75 N. W. Rep. 524.

Where statute requires that no improvement be made except upon petition of the owners of a majority of the front feet abutting on the street proposed to be improved, such owners cannot be made to pay for an improvement that was ordered without such petition. Brady *v.* Rogers, 1 Mo. App. Rep. 774, 63 Mo. App. 222.

Charter of City of Sheboygan prohibits any order for paving streets to be made unless petitioned for, or passed by three-fourths vote of council. *Held*, an order made without either was void. Dieckmann *v.* Sheboygan, 89 Wis. 571, 62 N. W. Rep. 410. See Steinmiller *v.* Kansas City (Kan.), 44 Pac. Rep. 600; City of Bradford *v.* Fox, 171 Pa. St. 343, 33 Atl. Rep. 85; Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. Rep. 916; Boyd *v.* City of Milwaukee (Wis.), 66 N. W. Rep. 603.

Where petition is required, no valid assessment can be made to pay for improvements constructed without it. Miller *v.* City of Amsterdam, 28 N. Y. S. 1021; State *v.* Birkhauser, 37 Neb. 521, 56 N. W. Rep. 303.

Where statute provides for the improvement of a highway upon peti-

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tion of a majority of the property owners to be affected, the filing of the petition is jurisdictional, and an order for the improvement by the county commissioners without such petition is of no validity. Havey *v.* Barker (Kan.), 26 Pac. Rep. 585, 591.

The Michigan drainage law of 1885 provides, *inter alia*, that a township drain commissioner may clean out, widen, deepen, vacate, relocate, or extend any public drain only upon proper application for the work being filed. *Held*, that he had no authority to construct an entirely new drain except upon petition from the property owners to be affected. Tomlin *v.* Newcomb (Mich.), 33 N. W. Rep. 315.

Under Comp. Stats. Neb., ch. 89, a petition signed by the requisite number of property owners is a jurisdictional prerequisite to the establishment of a drain ; but the failure of the commissioners to find that the signers of the petition are owners of the land to be affected is not a jurisdictional defect. County of Dakota *v.* Chenry (Neb.), 35 N. W. Rep. 211.

A contract for macadamizing is not void because the resolution ordering the macadamizing provided for grading also, council having no authority to order grading done except upon petition. Gafney *v.* City and County of San Francisco (Cal.), 13 Pac. Rep. 467.

Where statute provides that no street shall be altered or widened except upon application in writing by three-fourths of the owners of lands lying along said road, the acceptance of compensation by the owners for the lands taken, is not such a compliance with the statute as will dispense with the necessity for a petition. Carron *v.* Martin (N. J.), 69 Am. Dec. 584.

County commissioners are authorized to grant a final order for making a road improvement only upon receiving a petition from the majority of the resident land holders whose lands are to be benefited by, and ought to be assessed for, the improvement. This petition is essential to give jurisdiction. Hays *v.* Jones, 27 Ohio St. 218; McCormick *v.* Authur, 27 Ohio St. 251 ; Clark County Com'rs *v.* Gilbert, 57 Ohio 258; Burgett *v.* Norris, 25 Ohio St. 308.

Where statute provides that whenever a majority of the property owners within a certain distance of the line of a highway shall petition that it be improved, the board of county commissioners shall order it done, the commissioners have no authority to order such improvement in the absence of a petition. Wyandotte County Com'rs *v.* Barker, 45 Kan. 681, 26 Pac. Rep. 581.

Where a petition is required, the act of a county board in ordering the construction of a levee, is void without it. But such defect may be remedied by a curative act validating the act of the supervisors and authorizing the levy of an assessment therefor, after due notice, as the petition could have been dispensed with in the first instance. Richman *v.* Muscatine County, 77 Iowa 513, 4 L. R. A. 445.

The legislature may confer power upon municipal authorities to improve streets and assess the cost upon abutting owners without any petition therefor. Dennison *v.* Kansas City, 95 Mo. 416; Farrar *v.* St. Louis, 80 Mo. 379.

Under Indiana General Incorporation Act, 1857, the city council may, by a two-thirds vote, without any petition from the abutting owners, order the grading of a street and make the same a charge on the abutting property, or provide for its payment out of the general revenue, at their discretion ; and this though the street has once been improved and paid for by the abutting owners, and is in good repair. Lafayette *v.* Fowler, 34 Ind. 140.

Where council is authorized to make improvements upon the petition of a two-thirds majority of the owners of adjacent lots, or upon a specified majority vote of council, and council passes an ordinance by the required majority, no petition is necessary, and the fact that there was an insufficient petition in such case will not affect the validity of the ordinance. McEneney *v.* Sullivan, 125 Ind. 407 ; Wren *v.* Indianapolis, 96 Ind. 206 ; Indianapolis *v.* Mansur, 15 Ind. 112 ; Lafayette *v.* Fowler, 34 Ind. 140.

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Where it appeared that two or more blocks on each side of a street in San Francisco had been graded and that the work of further grading upon the same street had been recommended by the superintendent of streets, and the resolution of intention of the supervisors to do the work had been duly passed and published, it was not necessary that there should be a petition by the landowners. Spaulding *v.* Wesson, 84 Cal. 141.

A petition from abutting lot owners is not indispensable where the common council proceeds according to the technical plan mapped out by the city charter. Kersten *v.* City of Milwaukee (Wis.), 48 L. R. A. 851.

Rev. Stats. Ind. 1881, §§ 5091–5114, requiring petition and bond in case of a public improvement do not in any way limit or control Act of March 7, 1885 authorizing the construction of turnpikes when in the opinion of the county commissioners it is necessary, etc. McClure *v.* Com'rs of Franklin County, 124 Ind. 154, 24 N. E. Rep. 741.

The city of Wilkes Barre never having accepted the provisions of Act May 23, 1874 (P. L. 230), making the petition of a majority of the lot owners a condition precedent to the improvement of a street, is not controlled thereby, and may make such improvement under its charter without a petition therefor. Beaumont *v.* City of Wilkes Barre (Pa.), 21 Atl. Rep. 888.

It is not sufficient to allege that a petition was not signed by the requisite two-thirds of the property holders interested when under the statute the city council may order the improvement without the petition of two-thirds. DePuy *v.* City of Wabash (Ind.), 32 N. E. Rep. 1016.

Under Comp. St. ch. 78, § 46, a petition is not necessary to render valid the act of the county board in opening a section line road. Rose *v.* Washington County, 42 Neb. 1, 60 N. W. Rep. 352.

A resolution of city council stated that it was necessary to improve a certain street without a petition because it was unsafe, and because the abutting property owners refused to petition for the improvement. *Held*, to be a sufficient statement of their reason for proceeding without a petition. Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. Rep. 603. And see City of Connersville *v.* Merrill, 14 Ind. App. 303, 42 N. E. Rep. 1112; Marionville *v.* Herson, 65 Mo. App. 397; Smith *v.* Minto, 30 Ore. 351, 48 Pac. Rep. 166; Kersten *v.* City of Milwaukee, 81 N. W. Rep. 948, 1103.

Under Ind. Rev. Stat. 1894, § 4394, no petition is necessary for a sidewalk improvement. Nor is § 4394 repealed by §§ 4401–4403, providing that petition may be made for the improvement of sidewalks as well as for streets and alleys. Keith *v.* Wilson, 145 Ind. 149, 44 N. E. Rep. 13.

Under Ga. Act, Sept. 3, 1881, the making of any public improvement in the city of Atlanta, and the payment therefor, either by general taxation or local assessments, are matters resting solely in the sound discretion of the common council, and no petition is necessary to enable them to act. Morrison *v.* King, Mayor, *et al.*, 100 Ga. 357, 28 S. E. Rep. 108.

Where paving improvement is authorized to be made upon a two-thirds vote of city council, no petition therefor is necessary. Pittsburg, etc., R. Co. *v.* Crownpoint, 150 Ind. 536, 50 N. E. Rep. 741.

The object of Pa. Act, May 22, 1895 (P. L. 105), was to enable municipal corporations to improve streets and assess the costs thereof, in part at least, upon the abutting owners without a petition having been presented. *Re* Greenfield Ave., 191 Pa. 290, 43 Atl. Rep. 225.

No petition is necessary where the ordinance ordering the improvement is passed by unanimous vote of council, the statute conferring authority upon council to order such improvements by a two-thirds vote without a petition. Metcalf *v.* Carter, 19 Ohio Cir. Ct. Rep. 196.

Under section 15 of the New Orleans City Charter, the city may open and widen streets without regard to any action taken by the property owners. New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. Rep. 586.

Though provision is made in the Philadelphia City Charter for the widening of the city streets upon the petition of abutting owners, it is not exclusive, and does not deprive the city of its right to widen its streets without such petition. City of Philadelphia *v.* Hinckley, 9 Pa. Dist. Rep. 125.

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Under § 58 of the city charter of Jersey City no consent or petition of property owners is necessary where a change of grade is made necessary for the purpose of sewering. State *v.* Mayor, etc., of Jersey City (N. J.), 19 Atl. Rep. 1096.

A petition for change of grade is not necessary where change was immaterial and merely incidental to the paving of a street, and did not increase the cost thereof. O'Reilley *v.* City of Kingston, 114 N. Y. 439, 21 N. E. Rep. 1004.

2. Sufficiency.—In making an assessment for an improvement which includes two classes of work, for only one of which a petition is necessary, the record should show that the petition was signed by the requisite number of property owners affected by that part of the work for which such petition is necessary. Lathrop *v.* Buffalo, 3 Abb. App. Dec. (N. Y.) 30.

Under a charter requiring local improvements to be petitioned for by a majority of those whose names appear upon the assessment roll, it is competent for the owners of a part of the land benefited to petition for the improvement, and consent that the whole expense be assessed on their land. Baldwin *v.* Oswego, 1 Abb. App. Dec. (N. Y.) 62.

Where the charter required that before an improvement could be made there should be presented a petition signed by one-third of the property owners interested, and two petitions were presented, one asking for a main sewer, and the other asking for a main sewer with branches, it was held that both petitions were united in asking for the main sewer, and council was warranted in ordering its construction. Work *v.* Lockport, 28 Hun (N. Y.) 9.

Where it is prescribed by statute that the petition must comply fully with the law, a petition which states the termini of a proposed sewer, its lateral connections, and asks that it be constructed in accordance with the general plan adopted by the city, is sufficiently definite. State *v.* Jersey City, 30 N. J. L. 148.

The majority of owners is construed to be the owners of a majority of the property fronting along the line of the proposed improvement. Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. Ann. 251.

A petition lacking the essential averments required by statute is no petition. Turrill *v.* Gratton, 52 Cal. 97.

A petition for the paving and grading of a street is valid though it does not request the grading and paving of the intersections thereof. Wahlgren *v.* Kansas City, 42 Kan. 243.

Where a petition from the residents along a proposed line of improvement is a jurisdictional prerequisite to the ordering of the improvement, and there are no residents on the street which it is proposed to improve, a petition signed by the community at large is sufficient, it being a matter of general convenience that the street be improved. Fass *v.* Seehawer, 60 Wis. 525.

A statute required that a petition be signed by the owners of two-thirds of all the property on both sides of the street. Afterwards it was amended so as to require a petition from a majority of the owners only. It was held that the amendment merely charged the majority from two-thirds to more than half, and did not affect the provision touching the number of feet. Kyle *v.* Malin, 8 Ind. 34.

The owners of three-fourths of the frontage along the line of a proposed improvement petitioned that it be paved with wood and stone,—eight feet of stone on each side and twenty-four feet of wood between the stone. Another petition, signed by a minority in interest, asked that the street be paved with not less than thirty-two feet of wood centre, the wood to be treated after the manner of a named process, and the balance stone. The street was paved with stone and with wood treated after the manner of the named process, but not in the proportions asked for in the minority petition. It was held that three-fourths in interest had petitioned for the improvement. Wamelink *v.* Cleveland, 4 Ohio St. 381.

A petition which asks for an improvement and describes it simply as a "gravel road," is sufficiently definite. Stoddard *v.* Johnson, 75 Ind. 20.

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Where the selectmen have ordered work to begin upon a proposed highway, the filing of a petition asking its *discontinuance* is not sufficient to delay its construction. Taft *v.* Town of Pittsford, 28 Vt. (2 Wms.) 286.

Where the work petitioned for and ordered done comprised the building of a gravel road consisting of two separate parts, not contiguous, but which when built, would be connected by an old pike road, which was in existence at the time the new road was ordered, the fact that the work as contemplated would pass over and include the connecting stretch of old road, did not destroy the singleness of the work so as to make the petition void as asking for two improvements instead of one. Evans *v.* West, 138 Ind. 621, 38 N. E. Rep. 65.

The burden is on those desiring the improvement to show that the petition has been signed by the requisite number. Fleming *v.* Hight, 101 Ind. 466.

Where statute provides that certain improvements shall be made upon petitioners agreeing to pay an amount not exceeding one-tenth of the entire cost of the improvement, in proportion to the benefits received by each, a petition which sets forth that the property owners are willing to pay an amount not exceeding one-tenth of the value of the actual benefits, is insufficient, and proceedings based thereon are void. Cattrell *v.* Board of Chosen Freeholders of Middlesex County, 55 N. J. L. 238, 26 Atl. Rep. 94.

If it appears sufficiently from the evidence that the names of the requisite number of property owners were attached to the petition, and that they were placed there either by the owners themselves, or by their authority, or, having been placed there without authority were subsequently ratified, the petition is sufficient, and a mandamus will lie to compel the board of freeholders to proceed with the work. State *ex rel.* Lamante *v.* Board of Chosen Freeholders of Somerset County (N. J.), 35 Atl. Rep. 1.

Where statute provided that a petition should be signed by a majority of the land owners within one mile of a proposed free turnpike, except when an existing turnpike ran parallel and within two miles of the proposed pike, in which case the dividing line should run midway between the two, it was held, that where the road running parallel within two miles was a mud road, a petition signed by a majority of those living between the mud road and the pike, but within less than a mile of the latter, the whole number of signatures being less than a majority of all those living within one mile of the pike on each side thereof, was insufficient, and proceedings based thereon were void. State *v.* McClyman, 7 Ohio Dec. 109.

To render valid the proceedings of the road commissioners, under the road improvement acts of March 31, 1868, and May 9, 1868, it is not necessary that a majority of the resident landholders whose lands are finally assessed for the improvement should have signed the petition. Parker *v.* Burgett, 29 Ohio St. 513.

Upon the presentation of a duplicate petition, under act March 29, 1867, the duplicates being signed by different petitioners, but together containing the requisite number of names, the omission of the auditor to record one of the duplicates constitutes no ground for enjoining the prosecution of the work. Braden *v.* Logon County Com'rs, 31 Ohio St. 386.

In a proceeding for the improvement of a road or street, under Swan & C. St. p. 1509, § 46, it is not essential that the necessary two-thirds shall sign one petition. If more than one petition is actually pending when the order is made, and they together contain the requisite number of petitioners, the power to make the order cannot be impeached on the ground that the trustees acted on one of them only, which was not signed by two-thirds of the resident owners. Campbell *v.* Park, 32 Ohio St. 544.

M presented a petition to the county commissioners signed by himself and others, praying for the laying out and construction of a county road, and for the improvement of two existing roads; to constitute,

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when the construction and improvement were completed, one continuous line of road. The petition conformed strictly to the requirements of 64 Ohio Laws, p. 80, § 2, whereupon A and others, resident landowners, whose lands were benefited thereby, and were to be assessed for the improvement, petitioned the commissioners, by another paper, "to be counted as petitioners" for the road improvement "petitioned for by M and others." *Held*, that A and others were to be treated as having subscribed the petition for the improvement provided for by said section. Putman County Com'rs *v.* Young, 36 Ohio St. 288.

Where objections are made to a petition for the construction of a free gravel road, and a special verdict is had thereon, which finds that the petition was signed by the required majority of property owners, a *venire facias de novo* will not be awarded on such verdict on the ground that it is insufficient in not giving the names of the petitioners and describing their several properties. Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. Rep. 949.

A petition signed by five freeholders, though not residents of the township, describing generally the beginning, course, and terminus of a proposed drain, is sufficient to confer jurisdiction upon the township drain commissioners under Public Acts of Mich. 1885, No. 227. Kinnie *v.* Barb (Mich.), 36 N. W. Rep. 672.

Where charter requires petition for street improvement to be signed by the resident owners of more than half the abutting property, but does not provide how the fact of residence shall appear, such petition need not show that the signers are a majority of such resident owners, but it will be presumed that the council acted correctly until the contrary appears. And only a majority of the abutting property owned by residents need be represented in the petition. And in determining the frontage of abutting property, the width of each street crossing the improved street should be subtracted from the total line of improvements. Wright *v.* City of Tacoma (Wash.), 19 Pac. Rep. 42.

A delay by petitioners for three years in seeking to enforce action on the petition by the supervisors is laches, especially in the absence of evidence that there has been no change of ownership of the lands affected, and that the original petitioners are still the majority of the resident owners and wish the proceedings begun. And even if the petitioners are not guilty of laches, succeeding supervisors will not be compelled to act on the original petition, in the absence of evidence that the ownership of the lands is unchanged. State *v.* Graffam (Wis.), 43 N. W. Rep. 727.

Where statute provides that in proceedings for the establishment of a drain a majority of the resident landowners must make an application in duplicate to the supervisors of both towns affected, a petition for a writ of mandamus to compel supervisors to act on the application will be denied when the evidence fails to show that duplicate petitions were presented as required. State *v.* Graffam (Wis.), 43 N. W. Rep. 727.

Under Hill's Code Ore., § 4062, providing that petitions for laying out highways shall be signed by at least twelve householders, etc., it is not necessary that the petitioners allege on the face of the instrument that they are householders. Bewley *v.* Graves (Ore.), 20 Pac. Rep. 322. And see Shull *v.* Brown (Neb.), 41 N. W. Rep. 186.

A petition which does not show who are the owners of lands over which the proposed road is to be laid or whose interests are to be affected thereby, is insufficient. Cowing *v.* Ripley, 76 Mich. 650, 43 N. W. Rep. 648.

The statutes of Oregon require a petition for laying out a county road to specify the place of beginning, the intermediate points, if any, and the place of its termination so definitely and certainly that a person of ordinary intelligence need not mistake their location. *Held*, that a description of the terminal point as "the point of intersection of the last course with the present C. V. & R. C. road, between the residences of C. L. P. and O. B.," did not answer the requirements of the statute. Woodruff *v.* Douglas County (Ore.), 21 Pac. Rep. 49.

But the description of the course of a road from a certain point and

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"thence northwesterly" to its termination 10 miles distant, is sufficient without giving any intermediate points, and does not mean that the road shall run in a direct line to the point of ending. Ames *v.* Union County (Ore.), 22 Pac. Rep. 118.

With reference to the number of landowners who must petition for an improvement, the statute regards each street as a unit for the purpose of all computations, and it is immaterial that the land of one owner, who is opposed to the work, is entirely at one end of the street, which is five miles long, and that for a distance of a mile from his property much less than one-fourth of the owners in number or frontage have signed the petition. Barber Asphalt Pav. Co. *v.* Gogrene, 41 La. Ann. 251, 5 So. Rep. 848.

Where town trustees have authority to make an improvement upon petition of two-thirds of the owners of the adjoining property, or upon a two-thirds vote of the trustees without a petition, the fact that a petition was signed by less than two-thirds of the owners is no objection when the order for improvement was passed by a two-thirds vote. McEneney *v.* Town of Sullivan, 125 Ind. 407, 25 N. E. Rep. 540.

Under Sess. Laws Kan. 1887, ch. 99, § 4, providing that a majority of the property owners may petition council "to grade any street and to grade and pave the intersections thereof," etc., the petition is valid though it does not contain a request for the grading and paving of the intersections. Wahlgren *v.* Kansas City, 42 Kan. 243, 21 Pac. Rep. 1068.

Laws Mich. 1885, No. 227, ch. 3, § 1, does not require the primary petition for the construction of a drain to state that the drain is necessary for the public health or highways, or that it is a public necessity. Kinnie *v.* Bare (Mich.), 45 N. W. Rep. 345.

Under Laws N. Y. 1871, ch. 536, § 4, adding § 19 to Laws 1870, ch. 77, tit. 6, which provides that no ordinance shall be passed for paving a street in the city of Albany unless a petition for the same shall have been presented to the common council, signed by persons owning not less than one-third of the number of feet fronting both sides of the street, the presentation of a proper petition is jurisdictional, and an assessment for paving a street ordered on a petition not signed by the requisite number of owners is invalid. *In re* Delaware & H. Canal Co., 8 N. Y. S. 352.

Where the board of county commissioners refuse to establish a highway upon petition being made, and afterwards dismiss a second petition without going into the merits thereof, they are not precluded from establishing the highway upon a third petition being presented, as they have the right to change their minds with the changing times and circumstances of the community. Warlick *v.* Lowman, 111 N. Car. 532, 16 S. E. Rep. 336. And see Smith *v.* Com'rs of Hudson Tp. (Ill.), 36 N. E. Rep. 967.

In order to confer jurisdiction upon the mayor and council to order a public improvement the petition must be signed by the required statutory majority and without conditions. Von Steen *v.* City of Beatrice (Neb.), 54 N. W. Rep. 677.

Property owners petitioned that street be graded and graveled, total cost not to exceed $750. *Held*, that without a new petition the board had no authority to macadamize the street and put in gutters at a cost of more than $5,000. Watkins *v.* Griffith (Ark.), 27 S. W. Rep. 234.

The petition for the opening of a new street must describe definitely the proposed improvements and its location. Wirth *v.* Jersey City (N. J.), 27 Atl. Rep. 1065.

Where two petitions are presented asking for a public improvement, one asking for a brick pavement, and the other for asphalt, the council may ignore the one having the less number of signatures and proceed in accordance with the request of the other. Cunningham *v.* City of Peoria, 157 Ill. 499, 41 N. E. Rep. 1014.

A petition is not defective because the certificate of the clerk to the copy of the ordinance attached thereto is defective, the statute not requiring certification of the ordinance, and it being no part of the peti-

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tion. Adcock *v.* Chicago, 160 Ill. 611, 43 N. E. Rep. 589; Doremus *v.* People, Kochersperger, 161 Ill. 26, 43 N. E. Rep. 701; Dickey *v.* Chicago, 164 Ill. 37, 45 N. E. Rep. 537; Gage *v.* Chicago, 164 Ill. 576, 45 N. E. Rep. 963. As to petition not setting out the ordinance, see McChesney *v.* Chicago, 43 N. E. Rep. 702.

The petition required under Ill. Act, June 14, 1897, § 4, is a written petition, as appears from § 7, requiring such petition to be addressed to the local improvement board. Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. Rep. 867.

Ill. Stat. required that an ordinance for certain improvement be based upon a petition therefor signed by specified majority of property owners. The names of certain owners, sufficient to make up the required majority, were signed by unauthorized persons. *Held*, that the ordinance based upon such petition was invalid, and the ratification of the signatures by the true owners after its passage could not serve to validate it. Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. Rep. 867.

As the law stood at the time of the presentation of a petition, the signatures of the owners of three-fourths of the property were required. The petition contained less than three-fourths of the signatures of such owners. Subsequently the law was changed so that less than three-fourths were sufficient. The petition not having been withdrawn in the meantime, it was held to be sufficient. Hay *v.* Cincinnati, 6 Ohio N. P. 22.

Under Ill. Act, June 14, 1897, a petition which is otherwise in proper form need not go into details concerning the improvement desired, it being sufficient that it describe it in a general way. Whaples *v.* Waukegan, 179 Ill. 310, 53 N. E. Rep. 618; Patterson *v.* Macomb, 179 Ill. 163, 53 N. E. Rep. 617.

Under Ill. Act, June 14, 1897, § 4, the signatures of the owners of a majority of the frontage on each separate block are required, and not merely the signatures of the owners of a majority of the frontage taken as a whole. And the want of a sufficient number of signatures is not cured by § 9, by which the recommendation of the improvement by the board is made *prima facie* evidence that all preliminary steps have been properly carried out. Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. Rep. 278. And see Farrell *v.* Park Com'rs, 55 N. E. Rep. 325, 182 Ill. 250; McManus *v.* People, 55 N. E. Rep. 886, 183 Ill. 391.

Petition need not show upon its face that it was signed by the required majority of resident owners. Kansas City *v.* Kimball, 60 Kan. 224, 56 Pac. Rep. 78.

Where the true name of a corporation is the "Rector, Wardens, and Vestrymen of Trinity Parish, Portland," it is an immaterial variance that it was signed, "Wardens and Vestry of Trinity Parish, by James Laidlaw, Clerk," it appearing that the clerk had been duly authorized to sign the corporate name. Allen *v.* City of Portland, 35 Ore. 420, 58 Pac. Rep. 509.

A petition which purports to be signed by the owners of a majority of the property to be affected, the amount of property owned by each petitioner appearing opposite his name, is sufficient although it does not show what the total amount of property is, council having convenient means of ascertaining that fact for itself. Allen *v.* City of Portland, 35 Ore. 420, 58 Pac. Rep. 509.

Where village charter authorizes its trustees to construct sewers upon application of a specified number of freeholders and legal voters, the petition is not sufficient unless it shows on its face that the requisite number of signers were freeholders and legal voters. Kent *v.* Village of Enosburg Falls, 71 Vt. 255, 44 Atl. Rep. 343.

A petition by property owners which asks for the improvement of "Oak St., between Willow and Schofield Sts., being a distance of one square," is sufficient to warrant an ordinance authorizing the improvement of "that portion of Oak St. and the sidewalks thereto between Willow and Schofield Sts." Wiles *v.* Hoss, 114 Ind. 371, 16 N. E. Rep. 800.

Alteration of a petition after some of the petitioners sign avoids it unless the requisite majority sign after the alteration. Graves *v.* Otis, 2 Hill (N. Y.) 466.

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Where certain persons petitioned that a portion of a street be placed under the control of the park commissioners, and subsequently the petition was altered by adding another portion of the street already within the park, and was then signed by other property owners, it was held not to be a material alteration. *In re* West Chicago Park Com'rs (Cook Co. Ct.), 1 Chic. L. J. Wkly. 343.

A town was given authority to improve any street or portion thereof whenever the owners of two-thirds of the property abutting thereon should present a written application to that effect. *Held*, that if the entire street was to be graded, the petition must be signed by the owners of two-thirds of all the property for the entire distance; if only a portion was to be improved, then by the owners of two-thirds of the property abutting on such portion; and where the whole was improved upon the petition of two-thirds of a part, it was an unauthorized proceeding and the assessments could not be collected. Swann *v.* Cumberland, 8 Gill (Md.) 150.

Certificate of the assessors as to the sufficiency of a petition is not conclusive and cannot validate a petition from which enough names have been withdrawn since the filing of the certificate to bring the number below the required majority. People *v.* City of Syracuse, 63 N. Y. S. 878, 30 Misc. Rep. 409.

The certificate of the city engineer that a petition contains the names of the required majority of the property owners, and an ordinance which also recites that it was signed by the required majority, are sufficient to establish *prima facie* that it did have the required number. City of Argentine *v.* Simmons, 54 Kan. 699, 39 Pac. Rep. 181.

Where the opening and improving of streets could be done only upon petition of the mayor and a majority or the property holders concerned, the certificate of the mayor that the required majority had signed was held not not to be conclusive; nor was the judgment of the county court; and the proceedings in a stated case were held void for noncompliance with the law in regard to petition and notice. Mulligan *v.* Smith, 59 Cal. 206.

The question whether a petition has been signed by the required majority is jurisdictional, and if they have not signed, the ordinance based thereon cannot be sustained. Keese *v.* City of Denver (Colo.), 15 Pac. Rep. 825.

Statute required that before a certain improvement be made there should be a petition signed by a majority of the abutting proprietors. A petition was presented and the work ordered done. It afterwards appeared that the petition was insufficient, owing to the fact that one of the signers was not in law a proprietor, and upon the city's seeking to enforce the collection of the assessment, a property owner sought to enjoin the sale of his property upon this ground. *Held*, that the presentation of a proper petition was a jurisdictional prerequisite and the complainant was entitled to his injunction though he had raised no objection until after the work was done. Holland *v.* Baltimore, 11 Md. 186.

A petition asking for the paving of a certain street, providing that it be done with a certain brand of vitrified brick manufactured by a certain company, said brick not to cost above a named price, is void as preventing free competition as required by the city charter. Larned *v.* Syracuse, 17 App. Div. 19, 44 N. Y. Sup. 857. But such petition is not void where it does not appear that such bricks are made under a patent and are not generally for sale in the market. Smith *v.* Syracuse, 17 App. Div. 63, 44 N. Y. Supp. 852; Rhodes *v.* Denver Public Works, 10 Colo. App. 99, 49 Pac. Rep. 430.

In determining whether a petition represents three-fourths of the front feet abutting on the street to be improved, under Rev. St. Ohio, § 2272, the number of feet abutting on the improvement and not the number assessable, are to be taken into consideration. Maker *v.* Cincinnati, 1 Ohio L. D. 161.

3. Notice.—In proceedings under the two-mile assessment pikes act (Rev. Stats. §§ 4829–4864), to improve a certain road, no notice is required of the filing of the petition or of its presentation to the commissioners. Thompson *v.* Love, 42 Ohio St. 61.

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A notice of a petition for an improvement, which describes the petition as "asking that said road be improved by macadamizing, under Rev. St. §§ 4829–4864, relating to improvement of roads, is sufficiently definite. Thompson *v.* Love, 42 Ohio St. 61.

The grantee of one of the property owners, which owner had signed the petition and executed the deed, was precluded from denying that so much of the road as passed over his land was duly established. Miller *v.* Schenck (Iowa), 43 N. W. Rep. 225.

One who obtains title to the land after the filing of the petition, in which the then holder of the legal title was named, and had notice, is a purchaser *pendente lite*, and is bound by the proceedings to the same extent as if he had the legal title when they were begun. Chaney *v.* State (Ind.), 21 N. E. Rep. 45.

Unless waived, proper notice of the filing of a drainage petition must be given, and the fact that certain of the property owners whose lands are to be affected have waived notice, will not prevent proceedings upon the petition being set aside upon motion of one who has neither had nor waived notice. Sites *v.* Miller (Ind.), 22 N. E. Rep. 82.

A railway depot six hundred feet from the point at which the proposed road connects with the main highway is a proper public place for the posting of notice of a petition under Comp. Stats. Montana, Div. 5, § 1809, there being no suitable place at the junction of the proposed road with the main highway. Territory *v.* Lannon (Mont.), 22 Pac. Rep. 495.

An immaterial variance between the names on a petition and the names as they appeared on the published notice of the petition, is not a jurisdictional defect under Hill's Code of Ore. § 4063; Bewley *v.* Graves, 17 Ore. 274, 20 Pac. Rep. 322.

Where statute directs that notice of an appeal shall be served on the four persons first named in the petition, etc., the direction is mandatory, and service on a less number will not give the court jurisdiction, nor will service on a person who has the greatest interest in the establishment of the highway and who has deposited the amount allowed the landowner. Finke *v.* Zeigelmiller, 77 Iowa 251, 42 N. W. Rep. 133.

Where statute requires the court to make an order prescribing what notice shall be given of the time and place of hearing a petition for a proposed improvement, a publication of the order is sufficient notice. Town of Muskego *v.* Drainage Com'rs (Wis.), 47 N. W. Rep. 11. And see also, Wright *v.* Com'rs of Highways of Middlefork (Ill.), 33 N. E. Rep. 876; Appeal of Toland, 147 Pa. St. 471; *In re* Roads in Sadsbury Tp., 147 Pa. St. 471; Hill *v.* Sup'rs, 95 Cal. 239.

Notice giving other termini of the proposed ditch than those stated in the petition, the commissioners being vested with discretion to change the termini when in their opinion the object sought will be better effected thereby, is not insufficient. Marsh *v.* Com'rs of Clark County, 26 Wkly. Law Bul. 3.

4. What Signatures May Be Counted.—In determining who are landowners within Swan & S. St. p. 676, providing for the making of public road improvements, resident tenants in common of undivided lands, who hold otherwise than as heirs, are to be counted as if they were owners in severalty. Makemson *v.* Kauffman, 35 Ohio St. 444.

In determining whether or not a majority of resident landowners who, as reported, will be benefited by a contemplated road improvement, are petitioners for the same, the commissioners are not authorized to count, in favor of the improvement the names of those who signed a former petition for a similar improvement over the same line, but which former petition has been abandoned. Makemson *v.* Kauffman, 35 Ohio St. 444.

Where statute authorizes an improvement to be made upon petition of a majority of the resident property owners upon such highway or street, and one petition is presented and tabled, and then a new petition is presented, the names of property owners appearing on the first but not upon the second, cannot be counted toward helping to make out the required majority on the second petition. Auditor General *v.* Fisher, 84 Mich. 128, 47 N. W. Rep. 574.

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Only those who signed the petition acted upon, and which petition, from the records of the township board, appears as the beginning and basis of the proceedings had in the improvement can be counted in favor of the same. One who lived with his minor children upon lands owned by the children and who signed as guardian, cannot be counted. His power over the real estate was limited to leasing it and to the reception of rents and profits. One who signed as administrator cannot be counted. Where husband and wife own land jointly, and only the husband signs, his signature cannot be counted, as neither husband nor wife could bind the land without the consent of the other. And it may be shown by parol evidence that they are husband and wife. Auditor General *v.* Fisher, 84 Mich. 128, 47 N. W. Rep. 574.

The administrator of an estate, the land of which is liable to assessment for a proposed improvement, has no authority as administrator, to sign a petition for such improvement. And where husband and wife are joint tenants, the husband cannot bind the property by his sole signature. McEneney *v.* Sullivan, 125 Ind. 407; *In re* West Chicago Park Com'rs, 1 Chic. L. J. Wkly. 343.

The finding of a township board that a petition has been signed by the required majority is not conclusive, and may be the subject of collateral attack. And where two petitions were presented at different times, and the first was tabled, the names appearing upon the first, which were not upon the second, could not be counted towards making up the required majority. McEneney *v.* Sullivan, 125 Ind. 407.

Neither the stockholder of a company which owns property liable to assessment for a proposed improvement, nor the administrator of an estate, the land of which is so liable, are proper persons to sign a petition for the improvement. Rector *v.* Board of Improvement, 50 Ark. 116; Mulligan *v.* Smith, 59 Cal. 206. But an alderman who was also a petitioner may vote for the improvement. Steckert *v.* East Saginaw, 22 Mich. 104.

The secretary of a corporation who is also the general manager of its affairs, and who consulted individually with the directors before signing, may bind the corporate property by subscribing a petition for a public improvement. Allen *v.* City of Portland, 35 Ore. 420, 58 Pac. Rep. 509.

The lessee of a lease for ninety-nine years renewable forever, though not the owner of the fee simple, is the "proprietor" to assent to a proposed paving improvement. Holland *v.* Baltimore, 11 Md. 186; Village of St. Bernard *v.* Kemper, 60 Ohio St. 244, 45 L. R. A. 662; Baltimore *v.* Boyd, 64 Md. 10, 10 Atl. Rep. 1028.

The signature of a homestead and railroad corporation made by its president and secretary cannot be counted in the absence of proof that they had authority to sign, or that the duty was incident to their office. Kahn *v.* San Francisco (Cal.), 25 Pac. Rep. 403, affirming 21 Pac. Rep. 849.

A California statute provided that a certain improvement should be made only upon petition signed by a majority of those whose names appeared on the last assessment roll. It was held that the signatures of persons other than those to whom the property was assessed upon the last preceding roll could not be counted. Kahn *v.* San Francisco, 79 Cal. 388, 21 Pac. Rep. 849.

Sections 22–34 of Act 20, 1882, are construed by section 35 to mean the owner or owners of a majority of running feet of property fronting on the street, or portion of the street, to be paved; and this interpretation applies with equal force to the petitioning property owners as to opposing memorialists. Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. Ann. 251, 5 So. Rep. 848.

The right of a corporation to hold real estate cannot be collaterally attacked upon a petition for the establishment of a drainage district. People *v.* Com'rs of Drainage Dist., 31 Ill. App. 219.

Where statute provides that a tenant for 99 years, or 99 years renewable forever, or the executor or administrator of such tenant, or the guardian of an infant owner, or a mortgagee in possession shall be deemed

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the owner for the purpose of any application to the mayor and council authorized by the act, the signature of a life tenant cannot be counted. City of Baltimore *v.* Boyd, 64 Md. 10, 20 Atl. Rep. 1028.

Where one not having the actual legal title signs as trustee, the court has no authority to convert his signature into that of a guardian for his children so as to bind their property. City of Baltimore *v.* Boyd, 64 Md. 10, 20 Atl. Rep. 1028.

An ordinance bond upon a petition was set aside. Afterwards a leaf of that same petition was taken from the files and attached to another ordinance for the same improvement. *Held*, that in the absence of proof of a reacknowledgment of their signatures by the persons whose names were on that leaf, they could not be counted. Nor could the name of one signed by his attorney, the attorney failing to prove his authority. State *v.* City of Bayonne (N. J.), 23 Atl. Rep. 648.

Persons who have only a parol agreement for the purchase of land, who have never taken possession nor paid the purchase money, are not the owners of the property within Act, May 16, 1891 (P. L. p. 79), and their signatures to a petition for opening a street are not to be counted. *In re* Iowa St. (Pa. Com. Pl.), 12 Pa. Co. Ct. R. 611.

One who dedicates a street to the public, which has never been accepted, is an owner of the property so dedicated, and his signature to a petition which is required to be signed by one-third of the abutting owners should be counted. State *v.* Jersey City (N. J.), 25 Atl. Rep. 272.

Where the proposed inprovement is the extension of an existing street, the majority in interest who may sign the petition refers only to those residing along the extension and not to those residing along the length of the entire street. Speer *v.* City of Pittsburgh, 166 Pa. St. 86, 30 Atl. Rep. 1013.

Under city charter prohibiting one who has signed a petition from withdrawing his name or presenting another petition or remonstrating within three months thereafter, one who has signed a petition asking that an improvement be made with a specified brand of vitrified brick, cannot, within a month after, sign a petition asking that the improvement be made with a different kind of brick. Smith *v.* Syracuse, 17 App. Div. 63, 44 N. Y. Supp. 852. And see People *v.* City of Syracuse, 63 N. Y. S. 878, 30 Misc. Rep. 409.

A city cannot, as against the citizen, petition itself to make a proposed improvement and add in land owned by it, and used for hospital purposes, in order to make out the necessary frontage required for the petition. City of Atlanta *v.* Smith, 99 Ga. 462, 27 S. E. Rep. 696. But see People *v.* City of Syracuse, 63 N. Y. S. 878, 30 Misc. Rep. 409.

Under statute permitting the owner of a perpetual leasehold to sign a petition for a public improvement, he can bind only his interest; and upon a forfeiture of the lease, the lessor will not be liable for the assessments. Kemper *v.* St. Bernard, 14 Ohio C. C. 134, 7 Ohio C. Dec. 617.

Under Ill. Act, June 14, 1897, § 4, relating to improvements made upon the petition of property owners, the word "owner" means the owner of the fee. Nor is the husband a proper party to sign where the property is owned by the wife. Nor can one tenant in common bind the property without authority from the other co-tenants. Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. Rep. 867.

A surviving partner has no authority to bind real estate standing in the firm name by signing a petition for a public improvement. Andrews *v.* Auditor, 5 Ohio N. P. 123.

A petition signed only by persons other than those who own property abutting on the line of the proposed improvement is insufficient. *In re* Union Alley, 9 Pa. Dist. Rep. 209.

Where one signs as the "Adm'x of the estate of C. F. C." it may be shown by parol evidence that she is in reality the owner of the property sought to be subjected, and the signature other than the name will be interpreted as *descriptio personae*. And one who has a life estate in half the land, and the sole and unrestricted management of the whole during the minority of a child aged 13, may sign under charter of the city

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of Portland §§ 94, 95 (Sess. Laws 1891, p. 823). Allen *v.* City of Portland, 35 Ore. 420, 58 Pac. Rep. 509.

A corporation may sign for property the legal title of which is held for it by two trustees. Allen *v.* City of Portland, 35 Ore. 420, 58 Pac. Rep. 509.

The board of education may sign, as they have power to acquire, hold, and dispose of property. Becker *v.* City of Columbus, 18 Ohio Cir. Ct. Rep. 888.

Where statute required the consent of certain of the property owners before certain improvements could be made, and a paper purporting to be such consent was placed before the commissioners, some of the signatures to which appeared to have been affixed by agents, there being no proof of their agency nor of the genuineness of most of the signatures, it was held that the paper was not in itself proof against the objectors, although it had been acted on by the commissioners. Thorn *v.* West Chicago Park Com'rs, 130 Ill. 594.

And so where a name to a petition was signed "per H, Atty." and it appeared that H had acted under a written power of attorney which was not proved, it was held that such name could not be counted. State *v.* Bayonne, 54 N. J. L. 293.

Where petition shows on its face that certain signatures were affixed by agents, the authority of the agents will be presumed, and if disputed may be proved by evidence dehors the petition. Where the signature of a corporation is so affixed, it need not be attested by the corporate seal. Allen *v.* City of Portland, 35 Ore. 420, 58 Pac. Rep. 509. As to who may sign a petition for public improvements, see Ahern *v.* Improvement Board, *post*, p. —.

5. Signing for Consideration—Fraudulent Procurement of Signatures.—Any combination or agreement whereby a few persons desirous of having an improvement made induce others to sign, either upon a direct consideration paid, or promise to save them and their property harmless, is a fraud upon the law, and cannot be enforced among the parties making it. Council has a right to presume that those signing did so in good faith, and may act accordingly. McGuire *v.* Smock, 42 Ind. 1, 13 Am. Rep. 353; Howard *v.* The Church, 18 Md. 451.

An assessment will not be enjoined on the ground that certain of the petitioners were induced to sign by false representations, where no objection was made before the sufficiency of the petition was established by the board. Com'rs Carroll County *v.* Justice (Ind.), 30 N. E. Rep 1085.

It is no ground for enjoining proceedings for a road improvement that one or more signed the petition therefor upon the promise of others to pay all assessments that might be made upon his or their lands to defray the cost of construction. Makemson *v.* Kauffman, 35 Ohio St. 444.

6. Withdrawal of Signatures.—Until the city has taken action upon the application to have improvements made, any of the petitioners may withdraw their names, and if the withdrawal reduces the number below that required by the charter, the improvement cannot be made; but after the city has entered into contract to have the work done, it is then too late for the petitioners to revoke their consent. Irwin *v.* Mobile, 57 Ala. 6; Bush *v.* Cincinnati, 18 Ohio Cir. Ct. Rep. 605; Andrew *v.* Auditor, 5 Ohio N. P. 123.

A petitioner may withdraw his name at any time before action taken on the petition, and the execution of a warranty deed by him subsequent to his signing is a withdrawal of his name. *In re* West Chicago Park Com'rs (Cook Co. Ct.), 1 Chic. L. J. Wkly. 343.

Where city is forbidden to proceed upon the filing of a protest signed by two-thirds of the resident property owners, the city cannot collect the assessment though those filing the protest subsequently withdraw their names therefrom. Roebling *v.* Inhabitants of Trenton (N. J.), 32 Atl. Rep. 685. See also, Armstrong *v.* Ogden City (Utah), 43 Pac. Rep. 119; Clinton *v.* City of Portland, 26 Ore. 410; Los Angeles Lighting Co. *v.* Los Angeles, 106 Cal. 156.

The death of one petitioning for a road improvement before the final

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order is made therefor, whose name is not withdrawn by those succeeding to the title to his land, does not affect the authority of the commissioners to count his name as one subscribing for the improvement. Makemson *v.* Kauffman, 35 Ohio St. 444.

Landowners who have subscribed a petition to the board of county commissioners for a road improvement may withdraw their names at any time before the final order is made, and names so withdrawn cannot be counted toward the number required by the statute. Hays *v.* Jones, 27 Ohio St. 218.

Where the requisite majority of property owners have signed a petition requesting the construction of a gravel turnpike, and the commissioners acting upon the petition find that the construction of such a road is necessary and expedient, it is then too late for petitioners to withdraw their names. But where, in such case, the commissioners proceed no further, and the matter remains in abeyance for six years, when it again comes up as a remonstrance against the construction of the road, in which remonstrance a number of the former petitioners join, it will be presumed that circumstances rendering the construction of the proposed road impracticable and inexpedient may have intervened, and the matter will be regarded as arising *de novo* and the withdrawal will be sustained. Ralston *v.* Beall (Ind.), 30 N. E. Rep. 1095.

The signatures to a petition asking for a public improvement are in the nature of a continuing offer and may be withdrawn at any time before action has been taken upon the report of the engineer or viewers. Black *v.* Campbell, 112 Ind. 122, 13 N. E. Rep. 409.

7. Improvement Not in Accord Therewith.—A petition for the grading of a section of a street, signed by the owners of one-sixth of the lands abutting on the part to be improved, does not warrant the city's paving, metaling, and curbing it. State *v.* Stockton, 61 N. J. L. 520, 39 Atl. Rep. 921.

Where property owners have petitioned for an improvement, and an ordinance has been passed ordering the street to be paved at the specified grade, such petition cannot be made the basis of a new ordinance ordering the establishment of a different grade. Whaples *v.* Waukegan, 179 Ill. 310, 53 N. E. Rep. 618.

Under Mo. Laws 1895, p. 65, sec. 95, the board is not compelled to grant all the walks prayed for in a petition, but may grant one and reject another. In other words, it is not compelled to grant all or none. City of Marshall *v.* Rainey, 78 Mo. App. 416.

A petition to council asking that they pave a street with a specified kind of brick does not restrict council to the use of bricks made by the same make, as it is in their discretion to determine the kind of material they will use. Terwilliger *v.* Pittsburg, 9 Kulp. (Pa.) 517.

Where a petition is a condition precedent to the doing of certain work by the city, and the city does the work, but not according to the terms of the petition, assessments therefor cannot be recovered. Brady *v.* Rogers, 63 Mo. App. 222.

Laws of Mich. 1885, c. 3, sec. 3, provides that in locating a drain the commissioner shall not be limited or confined to the precise starting point, route, or termini set forth in the application. *Held*, the establishment of a drain commencing 112 rods north of a given point was sufficient compliance with a petition which asked for a drain commencing 80 rods north of such point. Kinnie *v.* Bare (Mich.), 45 N. W. Rep. 345.

Where commissioners lay out a highway and fix one terminus 200 feet and the other 1,000 feet from the points named in the petition, it is not such a variance as will avoid the proceedings, it appearing that the change was necessary in order to connect two existing highways, which was the object sought to be obtained by the petition. People *v.* Hildreth, 5 N. Y. S. 308.

In Indiana, upon a petition for the improvement of the street but not the sidewalks, the trustees ordered the latter work done, and the assessment therefor was sustained. Wiles *v.* Hoss (Ind.), 16 N. E. Rep. 800.

8. Estoppel.—A landowner signed, circulated, and presented a peti-

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tion to the board of county commissioners for the improvement of a county road contiguous to his land, and continued to live in the immediate vicinity of the improvement during the time it was in progress. The improvement greatly enhanced the value of his property, much in excess of the tax or special assessment attempted to be imposed therefor. *Held*, that he was estopped from suing to restrain collection of the tax. Stewart *v.* Wyandotte County Com'rs, 45 Kan. 708, 26 Pac. Rep. 683; Wyandotte Co. Com'rs *v.* Arnold, 49 Kan. 279, 30 Pac. Rep. 486; Wyandotte Co. Com'rs *v.* Hoag, 48 Kan. 413, 29 Pac. Rep. 758; Andrus *v.* Board of Police, 41 La. Ann. 697, 6 So. Rep. 603; Downs *v.* County Com'rs Wyandotte (Kan.), 29 Pac. Rep. 1077; Wingate *v.* Tacoma, 13 Wash. 603, 43 Pac. Rep. 874; Barlow *v.* Tacoma, 40 Pac. Rep. 382; Storer *v.* Cincinnati, 4 Ohio Cir. Ct. R. 279.

The grantee of an abutting owner is bound by a petition signed by such owner and cannot object to an assessment for improvements made thereunder. Squier *v.* City of Cincinnati, 5 Ohio Civ. Ct. Rep. 400.

An owner who signs a petition and states therein that he has a certain frontage on the street, is estopped to claim that he has a less number of feet subject to assessment. Cincinnati *v.* Manss (Ohio), 43 N. E. Rep. 687. But an abutting owner is not estopped, by signing a petition, to object to the amount assessed on his lot. Manss *v.* City of Cincinnati, 10 Ohio Cir. Ct. R. 549. And see City of Dallas *v.* Atkins (Tex.), 32 S. W. Rep. 780; Andrey *v.* City of Dallas (Tex.), 35 S. W. Rep. 726; Alford *v.* Dallas (Tex.), 35 S. W. Rep. 816.

Petitioners to city council for public improvement must be understood as asking that it be done according to law, and if it turn out that the petition was invalid, the petitioners will be estopped from denying the validity thereof. Motz *v.* Detroit, 18 Mich. 495; Burlington *v.* Gilbert, 31 Iowa 356, 7 Am. Rep. 143. But such petitioners will not be estopped when proceedings upon their petition are conducted in a manner contrary to law. Steckert *v.* E. Saginaw, 22 Mich. 104. See also, Putnam *v.* Grand Rapids, 58 Mich. 416; Zeigler *v.* Hopkins, 117 U. S. 683; McLauren *v.* Grand Forks, 6 Dak. 397; Howell *v.* Tacoma (Wash.), 29 Pac. Rep. 447.

One who signs and circulates, and then presents to council a petition, knowing that it lacks the requisite number of signatures, is estopped from objecting to it on that ground. He is bound whether the other parties who signed are bound or not. Burlington *v.* Gilbert, 7 Am. Rep. 143, 31 Iowa 356; People *v.* Goodwin, 5 N. Y. 573; Kellogg *v.* Ely, 15 Ohio St. 66; Bidwell *v.* Pittsburg, 85 Pa. St. 412, 27 Am. Rep. 662; Cross *v.* Kansas City, 90 Mo. 13, 59 Am. Rep. 1; Tone *v.* Columbus, 39 Ohio St. 281, 48 Am. Rep. 438. *Contra*, Petition of Sharp, 56 N. Y. 257, 15 Am. Rep. 415.

Defects in a petition, not jurisdictional in their nature, may be waived by acquiescence in the proceedings. Ritchie *v.* City of South Topeka (Kan.), 16 Pac. Rep. 332; Gillett *v.* McLaughlin (Mich.), 37 N. W. Rep. 551.

One who has signed a petition for a drain and given a release for the right of way, and assented to all the proceedings in laying out and constructing the drain, cannot question the validity of the commissioners' proceedings for that purpose. But the mere act of signing the petition does not estop one from questioning the validity of the assessment upon the ground that proper notice of the letting of the contract and of the time and place of hearing objections was not given as required by law. Cook *v.* Covert, 71 Mich. 249, 39 N. W. Rep. 47.

Where the owner of land has dedicated it to public use as a street, and has signed a petition asking that it be adopted and improved, he will not be heard to question the validity of the proceedings upon an assessment to pay the cost of the improvement. State *v.* Hudson, 34 N. J. L. 25; Johnson *v.* Allen, 62 Ind. 57; Burlington *v.* Gilbert, 31 Iowa 356, 7 Am. Rep. 143; Motz *v.* Detroit, 18 Mich. 495; Byram *v.* Detroit, 50 Mich. 56. *Contra*, Petition of Sharp, 56 N. Y. 257, 15 Am. Rep. 415.

One who signs a petition for a change of grade is estopped to claim

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damages resulting therefrom on the ground that the petition was not signed by a sufficient number of persons. Cross *v.* Kansas City, 90 Mo. 13.

The fact that a property owner has signed a petition asking for an improvement will not estop him from showing in an action of trespass that the curbing and paving were done outside the street. Quinn *v.* Patterson, 27 N. J. L. 35.

Certain property owners, desiring a certain improvement made, filed an application with the city commissioners instead of with the mayor and council. The commissioners awarded the contract and the work was done at a cost of more than $100,000 the abutters entering no protest. *Held*, that they were not estopped from maintaining a bill to enjoin the collection of the assessment upon their property; that the entire proceedings of the commissioners was without authority and void, and could be satisfied neither by ordinance nor by act of the legislature. Baltimore *v.* Porter, 18 Md. 284.

The mere signing of a petition for the improvement of a road will not estop a landowner, who never presented the petition, and never knew that it was fatally defective when presented, or until after the work was completed, from alleging that a board of county commissioners had no power to authorize the improvement or cause assessments to be made therefor, when such improvement was made in a manner different from that which the petition requested, and in violation of the provisions of the statute. Wyandotte Co. Com'rs *v.* Browne, 49 Kan. 291, 30 Pac. Rep. 483.

The fact that defendant signed a petition for a highway does not dispense with the necessity of notice to the other owners and to the public, and defendant is not estopped to impeach the proceedings for want of such notice. State *v.* Logue (Wis.), 41 N. W. Rep. 1061.

Upon application of a holder of bonds, issued under a public improvement act for a *mandamus* to compel the city to levy a tax to pay the same, the city is not estopped by the fact that on presentation of the petition to the mayor he certified that it was signed by the requisite number of property owners. Kahn *v.* Board of Supervisors, 79 Cal. 388, 21 Pac. Rep. 849.

Those who petition for the grading of a street are not estopped thereby to deny the validity of the tax levy for such improvement on the ground that the statute was not complied with in making the improvement. McLauren *v.* City of Grand Forks (Dak.), 43 N. W. Rep. 710.

Where one signs a petition but makes therein no representation that the required majority has signed, he is not estopped from denying that a majority has signed, or from questioning the validity of the proceedings. *In re* Sharp, 56 N. Y. 257, questioning Burlington *v.* Gilbert, 31 Iowa 356, and commenting on People *v.* Goodwin, 5 N. Y. 568 and Kellogg *v.* Ely, 15 Ohio St. 64. See, as to estoppel, State *v.* Hudson, 34 N. J. L. 531; Quinn *v.* Patterson, 27 N. J. L. 35; State *v.* Burlington, 45 Iowa 87; Johnson *v.* Allen, 62 Ind. 57; Keese *v.* Denver, 10 Colo. 112; Tone *v.* Columbus, 39 Ohio St. 281 (reviewing authorities); Columbus *v.* Sohl, 44 Ohio St. 479; Baltimore *v.* Porter, 18 Md. 284.

9. **Collateral Attack.**—The finding of a township board that the necessary majority have signed a petition is not conclusive and the signing by such majority being a jurisdictional prerequisite may be made the subject of collateral attack. Auditor General *v.* Fisher, 84 Mich. 128, 47 N. W. Rep. 574; Miller *v.* City of Amsterdam, 149 N. Y. 288, 43 N. E. Rep. 632; Allen *v.* Portland, 35 Ore. 420, 58 Pac. Rep. 509. But see Kirchman *v.* West, etc., R. Co., 58 Ill. App. 515.

Where a certain improvement was authorized to be made upon petition of the owners of a majority of the frontage, and certain grading was done upon a petition from which it did not certainly appear that the petitioner owned the required number of front feet, it was held that since the board must necessarily have passed upon the sufficiency of the petition before ordering the work, it was properly presumed to be sufficient, and testimony to the contrary was properly excluded. Spaulding *v.* North San Francisco, etc., Ass'n, 87 Cal. 40, 24 Pac. Rep. 600, 25

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Pac. Rep. 249, distinguishing Mulligan *v.* Smith, 59 Cal. 206 and Kahn *v.* Sup'rs, 79 Cal. 388, 21 Pac. Rep. 849.

Proceedings had upon a petition are not rendered invalid by the fact that certain rulings therein were made by a disqualified judge, his acts being merely ministerial in their nature. Board of Com'rs *v.* Justice, 133 Ind. 89, 36 Am. St. Rep. 528, 30 N. E. Rep. 1085. But the action taken by the board in entertaining the petition, and making the order appointing the viewers and surveyor, was judicial in its character. Board of Com'rs *v.* Justice, 133 Ind. 89; Stoddard *v.* Johnson, 75 Ind. 20; McEneney *v.* Town of Sullivan, 125 Ind. 407; Loesnitz *v.* Seelinger, 127 Ind. 422. The acts of a disqualified judge, however, are not at common law invalid; they are liable to be avoided or reversed on proper application, but they cannot be impeached collaterally. Demis *v.* Grand Junction Canal, 3 H. L. Cas. 759; State *v.* Crone, 36 N. J. L. 394; Fowler *v.* Brooks, 64 N. H. 423, 10 Am. St. Rep. 425; Trawick *v.* Trawick, 67 Ala. 271; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114; Rogers *v.* Felker, 77 Ga. 46; Hine *v.* Hussey, 45 Ala. 496.

A board of town trustees having found that a certain improvement was made upon a proper petition, its finding cannot be collaterally attacked, but is conclusive in a suit to enjoin the assessments. McEneney *v.* Town of Sullivan, 125 Ind. 407, 25 N. E. Rep. 540.

A finding by a county court that due notice of application to open a highway had been given, cannot be made the subject of collateral attack in another court. Lingo *v.* Burford, 20 S. W. Rep. 459, 112 Mo. 149.

10. What Property Assessable.—A city cannot assess the whole cost of the improvement of seven streets upon the property abutting on nine streets where the only authority under which it proceeds is a charter which provides that upon petition by the owners of three-fifths of the frontage, it may assess the whole expense upon the abutting owners, but only one-half the expense in other cases. Hutchinson *v.* Omaha, 52 Neb. 345, 72 N. W. Rep. 218.

11. Proof of Signatures.—A proper petition containing the requisite number of signatures being a jurisdictional matter, the burden of proving the execution and presentation of such an instrument is upon those seeking to enforce the assessment. In the absence of statutory provisions such proof must be made by competent common-law evidence; otherwise, according to the statute. Thorn *v.* West Chicago Park Commissioners, 130 Ill. 594; Henderson *v.* Baltimore, 8 Md. 352; Dashiell *v.* Baltimore, 45 Md. 615.

12. Constitutional Law.—A city charter is held not to be unconstitutional which provides as follows: "The mayor and council shall have power and authority to cause and to procure all the streets and alleys, now established, or hereafter to be established to be paved and turnpiked at the cost and expense of owners of lots fronting such streets or alleys, and a petition of the owners of a majority of lots or parts of lots fronting on any square shall be sufficient to authorize a contract for paving or turnpiking the streets or alleys in such square; provided, however, the mayor and council, by their unanimous consent in council, may cause any street or alley, in any square in said city, to be paved, etc., at the cost, etc., of the owners of lots, etc., fronting such streets or alleys without any petition; and when such paving, etc., shall be completed, they shall apportion the costs, etc., equally on the lot holders, and a lien is hereby created on the lots, etc., for the same," Louisville *v.* Hyatt, 2 B. Monroe (Ky.) 177, 36 Am. Dec. 594; Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.) 514. See generally, *notes*, 3 Mun. Corp. Cas. 8, 19.

III. REMONSTRANCE.

1. Sufficiency.—The remonstrance need not be signed by any property owner in person. The signature of his authorized agent is sufficient. Fruin-Bambrick Construction Co. *v.* Giest, 37 Mo. App. 509.

An order of county commissioners will be absolutely void as to those owners who received no notification as required by statute, and may be collaterally attacked. Yet a complaint averring that no notice was given

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to the then owner of the land, as shown by the records in the recorder's office, is insufficient. McCollum *v.* Uhl (Ind.), 27 N. E. Rep. 152.

A taxpayer is not estopped from asserting a jurisdictional defect in public improvement proceedings where he had no knowledge of such defect until after the improvement was completed. Barker *v.* Havey (Kan.), 26 Pac. Rep. 585, 591.

An injunction will issue to restrain the sale of property assessed to pay for the grading of an alleged street, which in fact had never been opened, laid out, or in any way made a public highway, the owner having protested against the work at the time and sued the city for trespass. Copcutt *v.* City of Yonkers, 13 N. Y. S. 452.

A showing by plaintiff that objections to the assessment were filed by some of the abutting owners, and that council failed to hear or consider them does not give rise to the presumption that plaintiff was one of the objectors, or that the objections went to the validity of the assessment. Pooley *v.* City of Buffalo (N. Y.), 26 N. E. Rep. 624, affirming 26 N. E. Rep. 16.

Objections must be made in time, place and manner prescribed. McKusick *v.* City of Stillwater, 44 Minn. 372, 46 N. W. Rep. 769.

Where property owners object that certain improvements, namely, the repairing of a ditch, were not petitioned for, it is a sufficient answer to their objections that the statute does not require a petition in such case. Yeomans *v.* Riddle (Iowa), 50 N. W. Rep. 886.

The fact that three of twelve petitioners signed their Christian names by initials only does not entitle a remonstrator to defeat an assessment. Sample *v.* Carrol, 132 Ind. 496, 32 N. E. Rep. 220. See also, Yancey *v.* Thompson, 130 Ind. 585, 30 N. E. Rep. 630. It is no objection to a bond required to be filed with a petition that the obligors are all petitioners, it being sufficient in form and substance and the obligors being solvent. Sample *v.* Carrol, 132 Ind. 496, 32 N. E. Rep. 220. And see also, Hill *v.* Sup'rs, 95 Colo. 239.

Where commissioners gave notice that they would not meet at the western terminus of a proposed highway, and there hear objections and view the proposed route, and afterwards it was entered on the record book that they met at the "beginning" of the highway at the time appointed and walked over to the east end, it was held that there was no variance between the notice and the record. Smith *v.* Com'rs of Hudson Tp. (Ill.), 36 N. E. Rep. 967.

Where owner delays for five years to raise the objection of want of notice of certain improvements he is barred by his laches. Huntingdon Borough *v.* Foster, 14 Pa. Co. Ct. R. 292.

Where resident property owners enter a protest according to the provisions of the statute in such case made and provided, the council has no authority to close the contract in violation of such protest. And nominal grantees are not resident property holders within the meaning of the statute. Forbes *v.* Bradbury, 58 Mo. App. 506.

Consolidation Act (Laws 1882, ch. 410), § 990 providing for discontinuance of proceedings to open a street upon objections made by abutting owners, does not apply to streets of the first class, it being otherwise provided that such streets may be opened whenever in the opinion of the board, public interest shall require it. *In re* Board of Street Opening and Improvement of City of New York, 133 N. Y. 436, 31 N. E. Rep. 316.

A protest by a taxpayer which does not go to the whole of a proposed improvement is sufficient to the extent that it does go. Los Angeles Lighting Co. *v.* Los Angeles (Cal.), 39 Pac. Rep. 535.

Where a city charter requires that before a public improvement shall be ordered over the protest of property owners it shall be passed by a two-thirds vote of council, as *viva voce* vote is insufficient. Buckley *v.* City of Tacoma, 9 Wash. 269, 37 Pac. Rep. 446.

Under Code § 925, prohibiting the opening of a highway through an orchard or ornamental ground contiguous to a dwelling without the consent of the owner, a small grapevine, a wild currant bush, a wild plum tree three feet high, a cottonwood, and a few rose bushes do not consti-

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tute an orchard or ornamental ground. And the planting of fruit trees and a garden in the line of a highway will not prevent its establishment when not done in good faith. Ballou *v.* Elder (Iowa), 64 N. W. Rep. 622.

Under Miss. Code § 3011 the protest to put an end to the operation of an ordinance for the improvement of a sidewalk, must be signed by a majority of the owners abutting on the part to be improved. Nugent *v.* Jackson, 72 Miss. 1040, 18 So. Rep. 493.

Objection that the petition does not contain the signatures of the owners of a majority of the frontage in each block as required, is sufficient to warrant the court to consider evidence in support of such objection. Patterson *v.* McComb, 179 Ill. 163, 53 N. E. Rep. 617.

Under statute requiring objecting property owners to file a petition of remonstrance within a specified time, a communication filed with the clerk, stating that the signer "remonstrated against the acceptance of the contract," etc., is sufficient though it purported to be a "remonstrance" only. Girvin *v.* Simon, 127 Cal. 491, 59 Pac. Rep. 945.

Council need not determine or enter on record that a protest against a proposed improvement was not signed by the owners of a majority of the property where the protest on its face does not purport to be so signed. Pacific Pav. Co. *v.* Mowbray, 127 Cal. 1, 59 Pac. Rep. 205.

2. Notice.—A railroad company whose land is to be crossed by a proposed highway is entitled to the same notice as other property owners. Town of Lyle *v.* Chicago, etc., R. Co. (Minn.), 56 N. W. Rep. 820; Weymouth *v.* Com'rs of York County, 86 Me. 391, 29 Atl. Rep. 1100.

Where the statute provides for a publication of notice and an opportunity for a hearing upon a petition, it will be presumed after the work is done that such publication and opportunity for hearing were had, since the council could not have lawfully ordered the work done without it. Spaulding *v.* North San Francisco, etc., R. Ass'n, 87 Cal. 40.

Under Laws N. Y. 1871, ch. 536, p. 1134, which requires a publication of a notice stating the pendency of an ordinance relating to street improvements, and inviting "persons interested therein" to present objections, a notice which states that "any person" having objections to the passage of the ordinance is thereby requested to present them, without stating the time when this is to be done, is insufficient. *In re* Delaware & H. Canal Co., 8 N. Y. S. 352.

An ordinance requiring that before any street in the city of Baltimore shall be opened, extended, or widened, sixty days' notice thereof shall be given by publication in two of the daily papers of that city, requires that it be published once only in each paper. Central Sav. Bank *v.* Mayor, etc., of Baltimore, 71 Md. 515, 18 Atl. Rep. 809; Philadelphia, etc., R. Co. *v.* Shipley (Md.), 19 Atl. Rep. 1.

Where the common council is required to give two weeks' notice of a proposed improvement, which notice shall state a time and place at which objections may be heard, it is not necessary to appoint a committee to hear the objections. A notice to file such objections with the clerk is sufficient. Quill *v.* City of Indianapolis (Ind.), 23 N. E. Rep. 788.

The fact that a contesting landowner has personal notice of a proposed improvement will not dispense with the necessity of publication of notice. Rice *v.* Wellenon, 5 Ohio Cir. Ct. Rep. 334; Badger *v.* Drainage District (Ill.), 31 N. E. Rep. 170; Scudder *v.* Jones (Ind.), 32 N. E. Rep. 221; Borough of Verona *v.* Alleghaney, etc., R. Co., 152 Pa. St. 368, 25 Atl. Rep. 518.

Where statute provides that before certain improvements be made, notice and an opportunity to be heard be given objecting property owners, such notice is jurisdictional, and the want of it will invalidate the entire proceeding. Curran *v.* Com'rs Sibley County, 47 Minn. 313, 50 N. W. Rep. 237; Badger *v.* Drainage Dist. (Ill.), 31 N. E. Rep. 170; Kiphart *v.* Pittsburgh, etc., Ry. Co. (Ind.), 34 N. E. Rep. 375.

A notice which states that it is proposed to build a roadway thirty-six feet wide, with sidewalks twelve feet wide, but which says nothing of the materials to be used, is insufficient. Ladd *v.* Spencer (Ore.), 31 Pac. Rep. 474.

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Under R. L. Vt §§ 2922, 2923, notice of the opening and laying out of a highway is essential, and the selectmen have no jurisdiction to proceed without it. La Farrier *v.* Hardy (Vt.), 28 Atl. Rep. 1030.

Where charter provides that upon petition of the owners of one-half the lineal feet on one side of the street, the sidewalk on that side shall be improved by the abutters in the manner prayed for in the petition, or by the board, in case any abutter should delay improving his frontage for 30 days, it is not necessary that notice be given until the improvement is ordered. Winans *v.* Com'rs of Cranford (N. J.), 29 Atl. Rep. 429.

An ordinance providing for a public improvement is not void for want of notice under Act April 3, 1851 (Purd. Dig. 202), p. 8, § 3, the provision of that act in regard to notice being directory only. Huntingdon Borough *v.* Foster (Pa. Com. Pl.), 14 Pa. Co. Ct. R. 292.

Notice of a proposed improvement, specifying a time and place at which objections will be heard, and stating that the material to be used in the improvement is asphalt, is sufficient, and it is not necessary to specify the particular kind of asphalt. Verdin *v.* City of St. Louis (Mo.), 27 S. W. Rep. 447. See also, Perine *v.* Erzgraber (Cal.), 36 Pac. Rep. 585; Armstrong *v.* Ogden City (Utah), 34 Pac. Rep. 53, 9 Utah 255; Berkley *v.* Oregon City (Ore.), 33 Pac. Rep. 978.

Sec. 8, Acts 1893, p. 61, of an Act concerning cities, provides, among other things, that whenever the board of public works shall order the construction of any local sewer or drain, it shall cause the necessary drawings and specifications for such work to be prepared and filed in such office and shall cause a notice of the adoption of the resolution ordering the work to be done to be published in some daily paper of general circulation in such city once a week for two weeks. Such notice shall name a date after the last day of publication at which such board will receive and hear remonstrances from persons interested in or affected thereby. If the order is confirmed, or modified, the board shall cause another notice to be published once a week for two weeks, informing the public and contractors of the charter, specifications, etc., of the work. *Held*, that such section was not open to the objection that it did not provide for sufficient notice. Swain *v.* Fulmer (Ind.), 34 N. E. Rep. 639.

Under street law of Baltimore county (Acts Md. 1876, ch. 399), providing that the examiner shall give ten days' notice of the opening of a thoroughfare, which notice shall name a time and place at which objections will be heard, etc., one publication in each of two papers is sufficient, and it is in the discretion of the examiner whether any further publication be made. Philadelphia, etc., R. Co. *v.* Shipley (Md.), 19 Atl. Rep. 1.

Where statute requires notice in writing to resident property owners, failure to give personal notice to such owner is not a jurisdictional defect, and the property of such owner is liable to assessment for its fair and equitable proportion of the expense. Green *v.* City of Cincinnati, 7 Ohio Cir. Ct. R. 233. See further, as to publication and opportunity to object, Lake Shore, etc., R. Co. *v.* City of Durkirk, 20 N. Y. S. 596, 65 Hun 494.

3. Who May Make.—Tenant in dower in actual possession is an owner within the meaning of a charter provision requiring owners to build sidewalks in front of their premises. White *v.* Nashville, 2 Swan (Tenn.) 364.

Where statute provides that certain improvements may be ordered unless remonstrance be made by two-thirds of the resident owners of property liable to taxation for the same, a protest signed by owners who are not residents is of no avail. Marshall *v.* City of Leavenworth (Kan.), 24 Pac. Rep. 975.

Where it is provided that objections to improvements may be made by the owners of a majority of the abutting property one whose property is mortgaged will be deemed an owner only to the extent of the value of his property less the amount of the mortgage. *In re* Board of Street Opening, 15 N. Y. S. 865, 61 Hun 625.

Where the residents on a particular street entered into a contract with the city by which they agreed to furnish the material for a new sidewalk, the city agreeing to pay for the laying thereof, it was held that other taxpayers, not residing on that street could not object on the

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ground that no part of the cost was to be borne by the residents along the street improved. Reuting *v.* Titusville, 175 Pa. St. 512, 34 Atl. Rep. 916.

Provisions for objections to be made by "resident freeholders on such street" includes only the freeholders residing on the street which it is proposed to improve. Kirkland *v.* Board of Public Works, 142 Ind. 123, 41 N. E. Rep. 374.

Under Stat. 1889, p. 158, § 3, a co-tenant may sign a protest against a proposed improvement. Los Angeles Lighting Co. *v.* Los Angeles (Cal.), 39 Pac. Rep. 535.

Where the assessment is to be based on the enhanced value of the property, one claiming that his property will not be benefited by the improvement, has no standing as a remonstrator, for in such case his property cannot be assessed. Keel *v.* Directors of Levee District, 59 Ark. 513, 27 S. W. Rep. 590.

4. Objections by Majority.—The charter of St. Louis, art. 7, § 14, provides, that where the owners of the major part of the property along the line of a proposed improvement remonstrate against it the unanimous approval of all the members of the board of public improvement shall be necessary to the ordering of the same, and if a majority of the property owners fail to remonstrate, the improvement may be approved by a majority vote of the board. *Held*, that a finding by the board that a remonstrance was not signed by a majority of property owners was not conclusive. Fruin-Bambrick Construction Co. *v.* Giest, 37 Mo. App. 509.

Where improvements were to be made only with the consent of the majority in value of the owners of the property adjoining the locality to be affected, it was held that the "property adjoining the locality to be affected" was any property adjoining or near the improvement which was physically affected, or the value of which was commercially affected, directly by the improvement to a degree in excess of the effect on the property in the town or city generally. Little Rock *v.* Katzenstein (Ark.), 12 S. W. Rep. 198.

Where statute required a petition signed by the owners of a majority of the property liable for the cost of a proposed improvement, the council was held powerless to proceed in the face of a remonstrance by more than a majority in interest. Green *v.* Jersey City, 42 N. J. L. 565.

Consolidation Act (Laws 1882, ch. 410), sec. 990, which provides for the discontinuance of a proceeding to open a street upon objection made by a majority of the property owners, applies only to cases in which the opening of the street has been petitioned for by the property owners. *In re* 128th St., 31 N. Y. S. 732.

In estimating whether the owners of half the property along the line of improvement have objected, property owned by the city and used wholly for city purposes is to be deducted from the entire frontage. Armstrong *v.* Ogden City (Utah), 43 Pac. Rep. 119.

5. When May Be Made.—Where referee is directed to take proof as to the title of parties objecting, objection may be made to his report though no exceptions are filed thereto by the party objecting. *In re* Board of Street Opening, 15 N. Y. S. 865, 61 Hun 625.

Where statute provides that the finding of a board shall be conclusive as to the sufficiency of a petition unless interested property owners appear and file a remonstrance within a given time, and the interested owners fail to appear and make objection as required, they cannot afterwards attack the petition by the way of defense to a suit to collect assessments. Spaulding *v.* North San Francisco, etc., Ass'n, 87 Cal. 40, 24 Pac. Rep. 600, 25 Pac. Rep. 249.

An objection that drainage commissioners had no authority to act cannot be made for the first time on a motion for a new trial. And that other lands than his were improperly assessed is no ground for granting a new trial. Goodwine *v.* Leak, 27 N. E. Rep. 161. And an objection not raised before the commissioners will not be heard in the circuit court. Budd *v.* Reidelbach (Ind.), 27 N. E. Rep. 349.

Objection that certain names appearing in a petition should not be counted should be made before an appeal has been taken to the circuit

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court. Smith *v.* Goldsborough (Md.), 30 Atl. Rep. 574. And objection that a sufficient number have not joined in the petition must be made by remonstrance. Bronnenburg *v.* O'Bryant (Ind.), 38 N. E. Rep. 416.

The city charter of Sacramento provided that unless the owners of one-third of the adjacent property should protest against a proposed improvement within ten days after the last day of the publication of notice thereof, the council should order the work to proceed. The last day of publication was the 15th. On the 20th council passed an ordinance ordering the improvement made, which ordinance was approved on the 21st. On the 27th certain of the adjacent property owners filed a protest. It was held that the protest was ineffectual, not only because it was not filed within the ten days' limit, but because it lacked the requisite number of signatures; that the passing of the ordinance on the 20th and its approval on the 21st were of no consequence, as the council was only prohibited from proceeding with the work until after the expiration of ten days. Burnett *v.* Mayor, etc., of Sacramento, 12 Cal. 76, 73 Am. Dec. 518.

Where some of the landowners who signed the petition for the making of an improvement were induced to do so by false representations and false promises as to the amount which would be assessed against their lands, and by promises of one J. G. C. that he would pay all that their lands were assessed above a fixed amount, they must raise their objections before the sufficiency of the petition has been established by the adjudication of the board of commissioners. Board of Commissioners of Carroll County *v.* Justice, 133 Ind. 89, 36 Am. St. Rep. 528, 30 N. E. Rep. 1085; Osborn *v.* Sutton, 108 Ind. 443; Million *v.* Board, etc., 89 Ind. 5; White *v.* Fleming, 114 Ind. 560; Loesvitz *v.* Seelinger, 127 Ind. 422.

Objections that a petition has not been signed by the required number of persons must be made before the return of the viewers' report. Construing Rev. Stat. Ind. 1894, § 6880; Miller *v.* Burks, 146 Ind. 219, 43 N. E. Rep. 930.

Objections should be made before the beginning of the improvement or during its progress. In Indiana the sufficiency of the notice given cannot be drawn in question after the work has been done. Clements *v.* Lee (Ind.), 16 N. E. Rep. 799; County of Dakota *v.* Cheney (Neb.), 35 N. W. Rep. 211.

6. Waiver of Objections.—Want of notice of the time and place of hearing objections to the necessity for a proposed highway is waived by appearing at the hearing. Robinson *v.* Winch (Vt.), 28 Atl. Rep. 884; *In re* Washington St., 14 N. Y. S. 470.

Parties who filed objections to the improvement but did not object to the insufficiency of the notice, did not thereby waive the defect therein. State *v.* Town of West Hoboken (N. J.), 20 Atl. Rep. 737.

7. Authority of Council to Set Aside.—Where council has given notice of proposed improvement and a remonstrance has been filed, the hearing of which is pending, council may set aside the proceedings for irregularity, order them begun *de novo*, and require the filing of a second remonstrance. Clinton *v.* City of Portland (Ore.), 38 Pac. Rep. 407.

8. Effect of Judgment.—Where proceedings for the construction of a ditch are appealed from the board of commissioners to the circuit court for a trial *de novo*, the judgment of that court is conclusive on persons whose property was assessed though they neither petitioned for the improvement nor remonstrated against it. Mills *v.* Hardy (Ind.), 27 N. E. Rep. 618.

9. Contractor's Remedy.—A recital in an ordinance that a petition has been signed by the required majority is not conclusive. And where the city begins work under such ordinance, but abandons it upon discovering the defect in the petition, it will be liable to the contractor upon an implied guaranty that the petition was sufficient. Bill *v.* City of Denver (Col.), 29 Fed. Rep. 344. The falsity of such a recital may be shown in an ejectment suit brought by one whose land had been sold to pay such assessments. Zeigler *v.* Hopkins, 117 U. S. 683; Mulligan *v.* Smith, 59 Cal. 206.

AHERN *et al. v.* BOARD OF IMPROVEMENT DIST. NO. 3 OF TEXARKANA.

(*Supreme Court of Arkansas, Feb. 9, 1901.*)

[61 S. W. Rep. 575.]

Public Improvements—Petition—Majority in Value—Church Property to Be Considered.*—Under Sand. & H. Dig. §§ 5324, 5329, requiring a majority in number of owners of real property within an improvement district to petition for an improvement, church property, though exempt from general taxation, and therefore not appearing as valued on the county assessor's list, should be included in ascertaining the majority in value of the property in the district, since it is liable for local improvement assessments.

Same—Church Property—Ascertainment of Value.—Church property not appearing as valuable on the county assessor's list, extraneous proof of its value may be made, in determining the majority in value.

Same—Majority in Value—Improvements Made Since Last Assessment.—In determining whether a majority in value of the owners of assessable real property in an improvement district petitioned for an improvement, as required by Sand. & H. Dig. § 5329, improvements made on the property subsequent to the last county assessment, and before filing the petition, should be included.

Same—Property to Be Excluded—Railroad in Streets.—Where a spur track of a railroad ran on one of the streets in an improvement district, but it did not appear by what title the right of way was held, nor what its value was, except that the state board of assessment valued it at a certain sum per mile, nor that such property would be benefited by the improvements, it was proper to exclude it, in determining whether a majority in value of the owners of assessable real property in the district signed the petition for the improvement, as required by Sand. & H. Dig. § 5324.

Same—Same—Right of Way of Water and Light Companies.—In determining whether a majority in value of the owners of assessable real property in an improvement district petitioned for an improvement as required by Sand. & H. Dig. § 5324, the underground right of way along the street of the water pipes of the water works company, the ground in which the poles of the telegraph and electric light companies stood, and the right of way of overhead wires were properly excluded.

Same—Same—Public Property.—Public property, not being assessable, was properly excluded.

Same—Who May Sign—Executor.—It was improper to include property belonging to an estate signed for by the executor, since he had no power to bind the heirs by such signing, though clothed with a power of sale.

Same—Same—Widow of Owner.—It was improper to include property of an estate signed for by the widow of the deceased owner, since, being only a life tenant, she was not the owner, within the statute.

Same—Same—Tenant in Common.—Only one-half of property belonging to tenants in common, and signed for by only one of them, should be included in the petitioners' list.

Same—Same—Mortgagor.—It was proper to include mortgaged property signed for by the mortgagor, though a decree of foreclosure of the mortgage had been rendered, since as the mortgagor had the right to redeem, he was the owner, within the statute.

Same—Same—Vendor and Vendee.—It was proper to include property sold before the presentation of the petition, and signed for by the seller, of which the purchaser had knowledge when he purchased.

Same—Same—Vendee in Possession.—It was proper to include prop

*See Thomason *v.* Carroll, *ante*, p. 76, and *note*; also *notes*, 3 Mun. Corp. Cas. 8, 19.

erty signed for by the purchaser, who was in possession and had done all that he was required to do to complete the purchase, where delivery of the deed was delayed by the vendor until four days after filing the petition.

Same—Property Improperly Excluded—Property Improperly Included—Affirming Assessment Liens.—Where in determining whether a majority in value of the owners of real property in an assessment district signed a petition for an improvement, as required by Sand. & H. Dig. § 5324, property was included which should not have been, and some which should have been included was omitted, but, on deducting the amount improperly included and adding the amount improperly excluded, it appears that an excess of the majority in value of the owners signed the petition according to the valuation of the county assessor, a decree foreclosing an assessment lien for delinquent assessments for the improvement will be affirmed.

Same—Assessment Lien—Homestead.—Const. art. 9, § 3, provides that a homestead shall not be subject to the lien of a decree of any court, except for purchase money, specific liens, or for taxes. Article 19, § 27, provides that nothing in the constitution shall prohibit the general assembly from authorizing assessments on real property for local improvements. *Held*, that the homestead is not exempt from the lien for assessments for local improvements.

Same—Objections—When Must Be Made.—Where objections to irregularities in the proceeding of the board of benefit assessments and the city council subsequent to the passage of an ordinance authorizing an improvement on the petition of a majority in value of the property owners in the improvement district were not made within 20 days, defendants are barred from setting them up in a suit to enforce the tax lien for the improvement.

Same—Estimating Assessments—Value of Land—Benefits Received.—Under Const. art. 19, § 27, providing that nothing in the constitution shall prohibit the general assembly from authorizing assessments on real property for local improvements, based on the consent of a majority in value of the property holders adjoining the locality affected,—such assessment to be ad valorem and uniform,—an assessment for local improvements in proportion to the benefits is not prohibited; but it is within the discretion of the legislature to require such assessments to be made according to the whole value of the land in the improvement district, or according to the value of the benefits.

Appeal from circuit court, Miller county; Joel D. Conway, Judge.

Suit by the board of improvement district No. 3 of Texarkana against P. J. Ahern and others. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Oscar D. Scott, for appellants.

Williams & Arnold and J. D. Cook, for appellees.

BUNN, C. J. This is a suit in equity, under the statute, brought to foreclose assessment liens, and enforce the collection of the delinquent assessments against certain owners of real estate in the district. The chancellor decreed for plaintiffs on the complaint, answer, and testimony in the case, and defendants appealed.

In May, 1899, upon the petition of 10 resident owners of real property in the proposed district, the city council of the city of Texarkana, in this state, organized said improvement district No. 3; and within the time required by law the clerk of said city council caused the organization ordinance to be

published as required by law, and due proof was made of the same. Within three months from the publication of said ordinance, to wit, on the 8th day of August, 1899, what purported to be a majority in value of the real property owners in the district filed their petition before the council, under section 5324, Sand. & H. Dig., and the city council on the same day passed an ordinance as provided in said section. At the same time the council appointed commissioners to assess the benefits to accrue to the real property in the district by reason of the contemplated improvements under the act approved May 8, 1899, amendatory of sections 5333, 5334, 5335, Sand. & H. Dig., who afterwards reported such assessment. A board of improvement was at the same time appointed, under section 5324, and this board proceeded to form plans for the improvement, and to do other things required by section 5329.

The principal objection—an objection which includes several others numbered in the abstracts and briefs in the case—is that a majority in value of real property owners in the district did not really sign the petition required by section 5324. To specify the irregularities covered by this objection, the defendants say: First, that all the real property in the district was not included in the ordinance passed on the petition; and, secondly, that much of the property going to make up the majority in value was signed for by persons not competent to do so. The petition was on the valuation made by the county assessor, as appeared from his assessment list, made in 1897, for the taxes of 1898 and 1899, which was at the time the last list on file in the clerk's office. The real fact is that the county assessor had made his assessment for the taxes of 1900 and 1901 in July,—the months before; but the same had not been returned and caused to be filed in the county clerk's office at the time the petition was filed, and, of course, not when the same was signed by the petitioners, and was not filed until in September following. This state of things has created some confusion in the record. The defendants contend that, in order to ascertain the majority in value of the property in the district, all the assessable property should have been included, and that all of said property was not included,—for instance, the real property of churches, which they show to have been of the value of $2,800. Church property is exempt from general taxation, and therefore does not appear as valued on the county assessor's list. By a decided weight of authority, however, although exempt from general taxes, church property is liable for local improvement assessments. The contention of the defendants is therefore sustained, and in such case extraneous proof of value is properly made. For a similar reason, the plaintiffs contend that improvements made upon real property in the district since the last county assessment, and before the filing of the petition, ought to be included; and they allege and show that such

improvements had been made within said time, upon the property of the signers of said petition, of the value of $24,650. Under this head the defendants allege that there was a spur track of the St. Louis, Iron Mountain & Southern Railway Company, which ran on one of the streets in the district for a distance of 1,000 feet, and that the track and right of way of the said railroad were valued by the state board of assessors at the rate of $2,000 per mile. It is not shown by what title or tenure this right of way was held by the railroad company,—whether by lease, easement, or license; and we, therefore, cannot say that it is real property of the company, as owner, in the purview of the law, nor whether or not it is assessable as such. The statement as to the assessment by state railroad board throws no light on the question, as we cannot ascertain from it that this spur track was included in that assessment, or was intended to be included; and, finally, it is not shown that this property would be benefited by the contemplated improvements. The same, and more, may be said as to the contention for exclusion of the underground right of way along the street of the water pipes of the waterworks company, and the ground in which the poles of the postal telegraph and electric light companies are set up, and the right of way of the overhead wires, all of which seem to have been assessed on the county assessment as personal property at the power house outside the district. These were properly excluded, under the showing made. Public property is not assessable, and was properly excluded.

The valuation of the real property in the district, according to the county assessor's books, was as follows:

For 1898, $570,310. Add to this the church property, and it makes		$573,110
Improvements		24,650
Total	2)	597,760
Majority		$298,880
For 1899		$606,607
Church property		2,800
Total	2)	609,407
Majority		$304,703½

In the matter of the property of J. F. Smith's estate, signed for by the executor, W. A. Williams: In Rector v. Board, 50 Ark. 116, 6 S. W. 519, this court held that an administrator is not competent to sign such a petition so as to bind the heirs. A majority of the judges cannot see any distinction between the power of administrator and an executor, although clothed with a power of sale as was the executor in this case. This property was valued at $6,600 for 1898, and $6,600 for 1899, and should be deducted from the petitioner's list. The property of the estate of G. W. Tyson was signed for by his widow.

The statute does not confer this right upon a tenant for life, and she is not the owner, in contemplation of the statute, except as a life tenant. Mayor, etc., v. Boyd, 64 Md. 10, 20 Atl. 1028. This property was valued at $4,500 both for 1898 and 1899, and should be deducted from the petitioner's list. In the matter of the property of S. M. & J. O. Hardin valued at $1,200 in both assessments, and only signed for by one of them, one-half should be deducted from the petitioner's list, —it appearing that they were tenants in common,—leaving $600. The same may be said as to the property of G. J. & F. M. Hollis, valued at $650 in both years, leaving $325 to be deducted. The $800 against J. P. Kline to be deducted by consent. The case of E. F. Friedell, whose property was valued for 1898 at $3,650, and $4,000 for 1899: He was a mortgagor. Foreclosure proceedings had been begun, and had progressed to a decree, but the mortgagor was still allowed to redeem at a future day. He was the owner, in the meaning of the law. F. H. Eubanks had purchased from Turner Bros. before the presentation of the petition, but Turner Bros. had signed the petition before they sold to Eubanks, of which signing the latter had knowledge when he purchased, and is bound by the lien. This property was valued in both assessments at $4,200. R. R. Gaines sold his property, valued in both assessments at $4,000 to Offenhauser; the petition having been signed by the latter for the property. The sale had been complete from Gaines to Offenhauser, and the latter put in possession. Everything had been done by the vendee that he was required to do, and he could have compelled specific performance. In fact, the deed, for reasons of Gaines alone, was delayed, but was delivered on 12th August. Offenhauser was a proper signer for this property. On the other hand, J. H. Mullins was a signer, but his property was not counted with the petition. It was valued at $1,400, and should have been so counted. The other objections under this head do not seem to be insisted upon.

According to the counsel's estimate, the property of the signers was valued at $294,900. Take from this the Smith and Tyson estates, $10,600, leaves $284,300; and add to this the $24,650 improvements, and the $1,400, value of Mullins' property, $26,050, we have the value of the property of the signers, $310,050—$925, Hollis & Hardin property, leaves $309,025, which is in excess of majority, according to assessment of 1898, of $10,145, and of the assessment of 1899 of $4,322.

It is contended by the defendants that the homestead is exempt from this assessment lien by section 3, art. 9, of the constitution of the state which reads as follows: "The homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the

purchase money, or for specific liens, laborers or mechanics' liens for improving the same, or for taxes," etc. These assessments, though differing in some respects from taxes for general purposes, are yet authorized under the taxing power. If so, so far as the mere exercise of power is concerned, the same rule applies as in cases of taxes. Besides, section 27, art. 19, of the constitution, under which improvement districts are formed and their assessments levied and collected, reads thus: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements, in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. But such assessment shall be ad valorem and uniform." After this much is said as the last section in the body of the constitution, it is not conceivable how we should be able to construe any other clause or section of that instrument so as to render nugatory and of none effect the provision therein contained; for, unless the real property of the district is bound for the expenses of the desired improvement, none could be made. This is the more apparent when it is known that in towns and cities a great portion, if not the most, of the occupied lots are occupied as homesteads. At all events, eliminate the homesteads in any town or city from the list of property bound for these assessments, and no district of important extent could be formed.

There is a suggestion of a possible conflict between the particular provision of our state constitution and the fourteenth amendment of the constitution of the United States, as construed in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. There was certainly some conflict between our original act authorizing the organization of improvement districts and the said fourteenth amendment as construed. But this was thought to be cured by our amendatory act approved May 8, 1899. To some of us, however, there still remains a conflict, or, rather, I should say, room for a conflict, accordingly as the benefit assessments under said amendatory act may be made according to the one method or the other. But a majority of us see no conflict as the law now is. In the proceedings at bar the assessments seem to have been both according to the value of the property, and also according to the assessed benefits; for the benefits were assessed by the rate of percentage on the assessed value of the property itself, resulting so as to comply with the provision of both constitutions as we see it. Therefore, for the purposes of determining this case, we need not discuss that point further. But, for the benefit of districts hereafter to be formed, some of us may take occasion to express an opinion on the subject before this decision goes to the publisher.

Some question is raised as to the proceeding of the board of benefit assessments and the city council subsequent to the ordinance passed upon the petition of the majority in value of the property owners, which we will say, by way of parenthesis, was duly published, so far as we can determine from the record. But we have settled the fundamental or jurisdictional questions involved, and as to mere irregularities, not going to the foundation principles upon which the district is organized, the objections were not made within the 20 days, and the defendants are therefore barred by the statute. Let the decree be affirmed.

RIDDICK, J. I concur in the opinion of the Chief Justice, but on one of the constitutional questions involved I can go further, and say that I see nothing in our constitution that necessarily prohibits an assessment in proportion to benefits. The section of the constitution which counsel for appellants contends forbids such an assessment is as follows: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality affected; but such assessments shall be ad valorem and uniform." Const. 1874, art. 19, § 27. It is said that an assessment levied upon the real property of the improvement district in proportion to the benefit that each lot or tract receives from the improvement is not an ad valorem assessment, and is therefore prohibited by the last clause of the section above quoted, which requires that such assessments shall be "ad valorem and uniform." But it seems to me that an assessment upon real property in proportion to the benefit it receives from an improvement is still an ad valorem assessment. It is, of course, not an assessment according to the full value of the lot or tract improved, but it is an assessment according to the value of the benefit which it receives. Not the value of the whole lot, but the value that is added to it by the improvement, is assessed. The benefit which each lot, tract, or piece of real estate in the improvement district receives is assessed according to its value, and therefore the assessment in an ad valorem assessment; that is, an assessment according to valuation as distinguished from an assessment according to frontage or area of lot. Again, it is said that the framers of the constitution by the clause above quoted meant an assessment according to the value of the whole lot or tract, and not an assessment according to the value of the benefit it receives from the improvement. It may be that they did not have in mind an assessment in proportion to benefits. We are not able to tell whether they did or not. But their intention must be found in the language of the constitution itself, and, as this language does not exclude or forbid an assessment in propor-

tion to the value of the benefits, we should presume that there was no intention to forbid such an assessment. It has often been decided that the only sound principle upon which assessments for local improvements can stand is that the property assessed is specially and peculiarly benefited by the improvement. Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Dill. Mun. Corp. (4th Ed.) § 761. If this be the basis upon which such assessments rest, then the most equitable method of apportioning the burden among the property holders of the district is by an assessment in proportion to benefits. Theoretically speaking, there can be no doubt of this; for if a number of property holders are required to pay for a public improvement, on the principle that their property receives a special benefit therefrom, the payment should be made by each in proportion to the benefit he receives. It would be neither right nor just to require one property owner to pay the full value of the benefit he receives from the improvement, while his neighbor is required to pay only a third or one-fourth of the value of the benefit he receives. But this inequality may result unless the assessment is made in proportion to the benefits received. And this furnishes another reason for believing that it was not intended to prohibit an assessment of that kind. For the obvious purpose of the prohibitory clause under consideration was to forbid, not equitable, but arbitrary and unjust, methods of assessment. The intention was to prohibit assessments from being made in proportion to the frontage or size of the lot or tract. For, as the size or frontage of the lot bears no certain relation either to its value or the amount of the benefit it will receive from an improvement, an assessment made in such an arbitrary method must often result in great injustice. Assessments of that kind had, at the time our constitution was adopted, often been condemned as arbitrary and unjust, and for this reason they were forbidden by the requirement that assessments should be "ad valorem and uniform." As the purpose was to prohibit arbitrary and unjust assessments, we should not expect to find a prohibition against so equitable and just a method of assessment as one made in proportion to the benefits received. The language used does not, to my mind, necessarily carry such a meaning; and to put such a construction upon it would, it seems to me, be a perversion of the meaning intended to be conveyed. I am, therefore, of the opinon that under our constitution it is within the discretion of the legislature to require that these assessments be made according to the whole value of the land in the improvement district, or according to the value of the benefit added by the improvement. For practical purposes, one of these methods of assessments may be as good as the other, and it is for the legislature to determine which shall be applied.

HUGHES and WOOD, JJ., concur.

LORDEN *v.* COFFEY.

(Supreme Judicial Court of Massachusetts, Suffolk, April 4, 1901.)

[60 N. E. Rep. 124.]

Constitutional Law—Local Improvement—Cost Greater Than Benefit.*
—St. 1892, c. 418, § 8, providing that the cost for improving a highway shall be a lien on the land without personal liability, and that the same shall be assessed against each parcel in proportion to the benefit from the improvement, is void, since the cost may be greater than the benefit.

Exceptions from superior court, Suffolk county; Frank A. Gaskill, Judge.

Action by John D. Lorden against Patrick Coffey. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions sustained.

This was an action of contract upon the covenant against incumbrances in a deed given by defendant June 20, 1896, purporting to convey land on Burbank street, Boston. On April 2, 1896, the street commissioners of Boston issued an order that notice be given "That this board is of the opinion that public necessity and convenience require that Burbank street * * * be laid out as a highway with the name of Fenelon street, and constructed by grading and covering; that they intend to take the action so required under the provisions of chapter three hundred and twenty-three of the Acts of 1891, and acts in amendment or addition thereto." A copy of the notice was duly published and on June 2, 1896, the board ordered and determined "that public necessity and convenience require, and we do hereby order that said highway be, under the provisions of chapter three hundred and twenty-three of the Acts of 1891, and acts in amendment or addition thereto, hereby laid out under the name of Fenelon street."

After the passage of the order and the giving of the deed, the street was constructed in accordance with the order, and on December 22, 1899, the board acting under the provisions of chapter 323 of the Acts of 1891 and amendatory acts, determined the assessable cost of laying out and the work of constructing the said Fenelon street to be $2,823.97 and assessed said assessable cost on the several parcels of land "herein specified," and under its order the board assessed upon the property conveyed as aforesaid the sum of $203.25. On July 31, 1900, the plaintiff, after demanding that defendant pay the same, paid the assessment with interest to the city. The court ruled that the assessment was valid.

James D. Thomson, for plaintiff.
Wilfred Bolster, for defendant.

HOLMES, C. J. This is an action on the covenant against

*See note at end of case.

incumbrances in a deed conveying land on Burbank street in Boston. A few days before the date of the deed the street commissioners had ordered that the so-called street should be laid out as a highway under St. 1891, c. 323, as amended by St. 1892, c. 418. After the date of the deed the street commissioners determined the assessable cost which subsequently the plaintiff paid. It is not denied that the lien for this cost was an incumbrance (Blackie v. Hudson, 117 Mass. 181, if the statute under which it was assessed is constitutional, and the case comes here on exceptions to a refusal to rule that the act is void. No other question is argued.

By St. 1892, c. 418, § 8, the assessable cost of the work is made a lien upon the land without personal liability, and the amount for which each parcel shall be liable shall be determined by the street commissioners "in accordance with the proportions in which said board shall determine that the said parcels of land are increased in value by the aforesaid order and the carrying out thereof." It is argued that, although the cost is to be divided among the estates liable in proportion to the benefit, the cost may be greater than the benefit, and that therefore an attempt to charge it all unconditionally to the benefited estates is void under recent decisions. Dexter v. City of Boston, 176 Mass. 247, 251, 57 N. E. 380.

We are of opinion that the argument is sound, and that the statute cannot be sustained. At first we had the impression that the required proportion to the increase in value could be construed to save it, as the word "proportional" was deemed sufficient to save St. 1899, c. 450, § 3. Hall v. Commissioners (Mass.) 59 N. E. 68. But the statute of 1899 simply fixed a maximum of not more than four dollars per linear foot as the sum which was to be charged in proportion to the benefit received. Under the statute before us the whole assessable cost is to be paid by the adjoining estates. "The said assessable cost of the work done under said order shall be assessed upon the several parcels of land" (St. 1892, c. 418, § 8), or as it read before amendment, "The said assessable cost * * * shall be repaid with interest to the city by the owners of the several parcels of land" (St. 1891, c. 323, § 15). There is no escape from the construction that the whole assessable cost is to be paid. What this cost is is defined in St. 1892, c. 418, § 7. It includes the expenses of taking land and all the main items to be expected. Plainly it may be greater than the benefit to the adjoining estates. The proportion in which the board shall determine that the parcel of land is increased in value determines the amount for which each parcel is to be liable, it is true, but as the total cost is to be divided among the several parcels, there is no chance to read the reference to this proportion as implying that the charges shall not be more than the benefit. The only effect which it can have is to determine the distribution of the tax among the different parcels which collectively

must pay the whole. We are unable to construe the statute in such a way as to make it consistent with the Constitution.

Exceptions sustained.

NOTE.

See *notes* to the following cases: State *ex rel.* Stateler *v.* Reis, 1 Mun. Corp. Cas. 504; State *v.* Mayor, etc., of City of Bayonne, 1 Mun. Corp. Cas. 305; Figg *v.* Thompson, 1 Mun. Corp. Cas. 607; Sears *v.* Street Com'rs of Boston, 2 Mun. Corp. Cas. 191; Fay *v.* City of Springfield, 2 Mun. Corp. Cas. 183; Hornung *v.* McCarthy, 3 Mun. Corp. Cas. 257; Adams *v.* City of Shelbyville, 3 Mun. Corp. Cas. 652; French *v.* Barber Asphalt Paving Co., *ante*, p. 1.

SANITARY DISTRICT OF CHICAGO *v.* CITY OF JOLIET.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. Rep. 566.]

Sewer Assessment—What Property Subject to.—Where lots belonging to the Chicago sanitary district along the drainage channel were no longer used as a spoil bank, and were not included in the channel or its appurtenances, such lots are subject to special assessment to pay for a sewer in the street in front of them; there being evidence that they would be thereby benefited, and their market value increased.

Same—Same—Determining Benefits—Instructions.—Where evidence in an action to recover assessments against lots of Chicago sanitary district showed that the lots were acquired for a temporary purpose, and that after the spoil bank was cleared off they were intended to be disposed of, and defendant's requested instruction that, in determining the benefits to the lots by the improvements, their present use and such other uses as they were reasonably adapted to should be considered, was given, defendant's requested instruction limiting benefits to uses to which it might subject the property was properly modified by including uses to which the lots might reasonably be put.

Same—Apportionment of Assessment—Frontage Rule.*—Where, in special assessment proceedings to pay for a sewer, the commissioner testified that he made the assessment according to special benefits to the property, in determining which he considered the present use of the property, its frontage on the street, and its possible uses, the assessment was valid, though the assessment of these lots and some other property corresponded with frontage in amount.

Appeal from Will county court; Albert O. Marshall, Judge.

Special assessment proceeding by the city of Joliet against the sanitary district of Chicago. From a judgment of confirmation, defendant appeals. Affirmed.

James Todd and P. C. Haley, for appellant.

E. G. Purkhiser, for appellee.

CARTWRIGHT, J. A special assessment was levied upon property fronting on Cass street, in the city of Joliet, including three lots of appellant, to pay for a sewer in said street. After a trial by jury the county court of Will county overruled appellant's objections to the assessment, and entered a judgment of confirmation.

Appellant claims that the proposed sewer in Cass street

*See *note* to Barber *v.* Asphalt Pav. Co., *ante*, p. 1.

will be of no benefit to the lots, because, under the law, its property is held for limited and special uses, and it can make no use of said lots which would require a sewer, and for the further reason that the location of said lots is along the drainage channel, so that a sewer would be of no benefit to them in any event. The drainage channel at that place is the Des Plaines river, which appellant enlarged and deepened. The lots lie almost wholly outside of the channel. About one-tenth of one lot at the back end was excavated and made a part of the river channel. One of the lots has a building on it, which was used as offices by appellant, and afterwards by contractors for the same purpose. The rest of the lots was used for a spoil bank, for the deposit of material excavated from the river. After the river was deepened and widened nearly all of the spoil bank was removed from the lots. There was some testimony, in answer to a hypothetical question assuming certain facts, that the sewer would not be of any benefit to the lots. The hypothesis stated in the question was that appellant could only acquire and hold land for the purpose of constructing its channel, for the purpose of carrying off and disposing of drainage and sewerage, to make and establish docks, and to dispose of water power incidental to the construction of channels or outlets, and that the Des Plaines river was not navigable, and appellant could not create water power at that point. If the hypothesis of fact stated is true, and appellant is confined, as a matter of law, to such uses as were mentioned in the question, it is difficult to see what possible use it could have for the lots; and, if they are not of use for the purposes of appellant, the law authorizes it to sell and convey them. The district had made use of the building for purposes for which a sewer would be a benefit to the property. The temporary use for a spoil bank had passed, and the property not being included in the channel or its appurtenances, if appellant could not make use of it for general purposes it would have no use for it; and the evidence shows that its value in the market would be enhanced by the sewer, and it would be more valuable to a private owner, and salable for a better price. The lots are adjoining the channel, and a sewer could be laid from them to the channel while appellant owns them if it chooses to do so; but such a sewer connection would involve expense, and there was evidence that the sewer in the street, and connection therewith, benefited the lots.

Appellant asked instructions limiting benefits to uses to which it might subject the property, and it complains that the court modified them so as to include not only the uses of appellant, but uses to which the lots might reasonably be put. The second instruction asked by the appellant and given authorized the jury to consider the present use of the property and such other uses or purposes to which it was reasonably adapted, and we see no distinction between that instruction

and the others, as modified. Inasmuch as the evidence showed that appellant had used the lots for office purposes, and leased them to others, and tended to show that they were acquired for a temporary purpose, and that after the spoil bank was cleared off they should be disposed of, we do not think the modification wrong.

Another proposition insisted upon is that the special assessment is illegal and void because it was spread according to the frontage of the property abutting on the street, and not according to special benefits. The lots could only be assessed on the principle of benefits to them, and the report of the commissioner shows that he made the assessment according to such benefits. He was also sworn as a witness, and testified that the assessment was made according to the benefits derived by the property from the proposed sewer, and that in arriving at such benefits he considered the present use of the property, its frontage on the street, and the possible uses to which it might be put. It appears that the assessment of these lots and some other property corresponds with frontage in amount; but that will not of itself vitiate the assessment, where it appears that the commissioner determined that the benefit was equal to the amount assessed. City of Springfield v. Sale, 127 Ill. 359, 20 N. E. 86; Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741. The evidence of the commissioner does not show that the assessment was not according to benefits. The judgment of the county court is affirmed. Judgment affirmed.

FISKE *v.* PEOPLE *ex rel.* RAYMOND.

(*Supreme Court of Illinois, Dec. 20, 1900.*)

[58 N. E. Rep. 985.]

City Ordinance Restricting Competition—Constitutional Law.—An ordinance requiring that a bidder for work on a public improvement shall agree to hire only members of labor unions in the performance thereof, and that, in all contracts executed by the commissioner of public works on behalf of the city, the contractor shall agree to hire only members of labor unions, is unconstitutional and void, as discriminating between different classes of citizens, and as restricting competition and increasing the cost of work.

Work Done under Valid Ordinance Not Affected by Invalid Ordinance.—Where work in making a street improvement was done under a valid contract and ordinance the invalidity of another ordinance or agreement restricting the hiring of labor to members of labor unions could not be urged against a judgment of sale for a special assessment therefor.

City Ordinance Infringing the Freedom of Contract—Constitutional Law.—A provision in the specifications to a contract for work on a street improvement prescribing the length of time which shall constitute a day's work, and making the contractor liable to forfeit the contract if laborers were compelled or allowed to work more than such time in one day is void and unconstitutional, as infringing on the freedom of contract.

Pleading—Objection to Contract for Street Improvement*—When Can Be Urged.—Objections to a contract for a street improvement can-

*See *note* to Thomason *et al. v.* Carroll *et ux.*, *ante*, p. 76.

not be urged for the first time on appeal from a judgment of sale for a special assessment.

Same—Same—Same.—A variance between the description of a street improvement in the estimate of cost, and the description of the improvement in the ordinance therefor, is a part of the proceedings anterior to the judgment of confirmation of an assessment, which, under the statute, if not complained of in the proceeding for confirmation, cannot be set up on the application for judgment of sale.

Appeal from Cook county court; O. N. Carter, Judge.

Application by the people, on the relation of S. B. Raymond, against David E. Fiske, for a judgment of sale for a special assessment for a street improvement. From a judgment for relator, defendant appeals. Affirmed.

This is an appeal from a judgment of sale of certain lots located in Cook county, for the nonpayment of a special assessment levied by the city of Chicago for curbing, grading, and paving South Ashland avenue from the street-railway right of way on West Twelfth street to the street-railway right of way on Twenty-Second street. The appellant filed objections to the entry of judgment and order of sale against his property, which objections were all overruled. Judgment was entered as prayed for in the application of the county collector. This appeal is prosecuted from said judgment.

George W. Wilbur, for appellant.

Charles M. Walker, Corp. Counsel, and Denis E. Sullivan, Asst. Corp. Counsel, for appellee.

MAGRUDER, J. 1. The first objection urged by the appellant is that a certain ordinance passed by the city of Chicago on October 17, 1898, is unconstitutional and void. Among the objections to the entry of judgment and order of sale was objection No. 12, which is as follows:

"The county court has no jurisdiction herein, because the original assessment proceedings, which are the basis of the application herein, are contrary to the constitution of the state of Illinois, and are therefore void, for the reason that on, to wit, the 17th day of October, 1898, the city council of the city of Chicago, in said county and state, passed a certain ordinance, as follows:

" 'An ordinance to provide for the hiring of union labor in public works.

" 'Be it ordained by the city council of the city of Chicago:

" 'Section 1. That the bids or proposals for doing any public work or making any public improvement shall contain a clause whereby the bidder shall agree to hire only such persons in the performance of such work as are members of labor unions, if there are labor unions in the city of Chicago comprising sufficient persons of the class necessary for the performance of such work; and, in all contracts executed by said commissioner of public works on behalf of the city, the contractor shall agree to hire only such persons in the performance of said work as are members of labor unions, if there are labor

unions in the city of Chicago comprising sufficient persons of the class of labor necessary for the performance of such work; and, in all such contracts, the right shall also be reserved to the commissioner of public works, in addition to those already prescribed, to rescind such contracts for non-compliance with the provisions herein named, and to declare such contract forfeited.

" 'Sec. 2. This ordinance shall take effect and be in force from and after its passage and publication,'

—Which said ordinance is in full force and effect. That by virtue of said ordinance open competition was restricted, and the cost of said improvement greatly enhanced, to the prejudice of this objector."

Undoubtedly the ordinance of October 17, 1898, is unconstitutional and void. The requirement that the bidder for doing the work on a public improvement shall agree to hire only members of labor unions in the performance of such work, and that, in all contracts executed by the commissioner of public works on behalf of the city, the contractor shall agree to hire only members of labor unions, amounts to a discrimination between different classes of citizens, and lays down a rule which restricts competition and increases the cost of work. Under our constitution and laws, any man has a right to employ a workman to perform labor for him, whether such workman belongs to a labor union or not; and any workman has a right to contract for the performance of labor, irrespective of the question whether he belongs to a labor union or not. Such ordinances and contracts as the ordinance of October 17, 1898, have been recently held to be unconstitutional and void, in the cases of Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, and Holden v. City of Alton, 179 Ill. 318, 53 N. E. 556. These cases are conclusive as to the invalidity of this ordinance. But the objection here made was properly overruled by the court below, because there is nothing in this record to show that anything was done under the ordinance in question, either to the injury of the appellant, or otherwise. The ordinance of October 17, 1898, is not shown to have been approved by the mayor, or to have been in force when this objection was made. But, whether it had been so approved or was so in force and effect or not, the improvement here under consideration was not made under and in pursuance of said ordinance. The ordinance for the improvement here under consideration was passed on May 16, 1898, and the contract for doing the work was entered into on November 1, 1898. The first section of the ordinance passed on May 16, 1898, under which the present improvement was made, is set forth in the case of Chicago Terminal Transfer Co. v. City of Chicago, 178 Ill. 429, 53 N. E. 361. The ordinance of May 16, 1898, and the contract made for the doing of the work, and the specifications attached to that contract, are all free from any provisions in regard to union labor,

or from any allusion to union labor. The proposal for the work upon the improvement is in the record, and contains no clause by which the bidder agrees to hire only members of labor unions. We are, therefore, unable to see how the ordinance of October 17, 1898, has any bearing upon the questions involved in this case. It was improperly admitted in evidence by the court below. If any bid or proposal had been made, or any contract had been entered into, by which the contractor, doing the work upon this improvement, agreed to hire only persons who are members of labor unions, a different question would arise. As the work which was done was done under a valid ordinance, and not under an ordinance void and unconstitutional for the reasons already referred to, the validity of any ordinance or agreement restricting the hiring of labor to members of labor unions could not here be urged as an objection to the entry of judgment of sale.

2. It is contended by counsel for appellant in his argument that a provision in the specifications attached to the contract made between the contractor and the city of Chicago for the doing of the work upon the improvement in question is illegal, as limiting the number of hours in each working day. The provision thus referred to is as follows: "In the prosecution of the work under these specifications, eight hours shall constitute a day's labor; and any contractor or contractors who shall compel or allow laborers or employees to work more than eight hours in one day shall be liable to have this contract forfeited, as provided by section 1687 of the Revised Code of the City of Chicago: provided, however, that in case of emergency the contractor or contractors may, by and with the written consent of the board of local improvements, allow laborers and employees to work extra time." That part of this clause in the specifications which makes the contractor liable for a forfeiture of his contract if he allows laborers or employees to work more than eight hours in one day is unquestionably void and unconstitutional. It infringes upon the freedom of contract, to which every citizen is entitled under the law. Ritchie v. People, 155 Ill. 98, 40 N. E. 1028, 29 L. R. A. 79. It is true that a legislative act which prescribes the length of time amounting to a day's work, when no special agreement upon the subject is made between the parties, is a valid act. But any statute providing that the employer and laborer may not agree with each other as to what time shall constitute a day's work is an invalid act. U. S. v. Martin, 94 U. S. 400, 24 L. Ed. 128. We, however, have searched in vain among the numerous objections made by the appellant in the county court to the entry of judgment of sale against his lots for any objection which has reference to this provision of the specifications attached to the contract. None of the objections make any reference whatever to the contract or to any of its provisions,—either to the specification requiring that eight hours shall constitute a day's labor, or to the

specification that the contractor shall not employ or permit to be employed any person or persons other than native-born or naturalized citizens of the United States. As no objection of this kind was interposed in the county court, it must be regarded as waived in this court, and cannot be made here. Chicago Terminal Transfer Co. v. City of Chicago, supra. It is, therefore, unnecessary for us to consider whether the objection to the contract upon the grounds here stated would have been well taken or not if such objection had been made in the court below, so as to be subject to review here.

3. It is further contended by counsel for appellant that the ordinance of May 16, 1898, providing for the improvement here under consideration, is void because improperly entitled. In other words, it is said "that the description of the improvement in the ordinance is not consistent with its title and enacting clause, and with the provisions of the ordinance authorizing the improvement." This very objection was considered in reference to this same ordinance in the case of Chicago Terminal Transfer Co. v. City of Chicago, supra, and we there held that there was no substantial inconsistency between the title and the ordinance. We are satisfied with the conclusion reached upon this subject in the case last referred to, and decline to further discuss it.

4. The further point is made by the appellant that the description in the estimate of the cost of the improvement does not correspond with the description of the improvement contained in the ordinance. In the estimate of cost the description in regard to the curbing referred to a certain number of lineal feet of curb wall at a certain price, and to a certain number of lineal feet of curb stones at a certain price; but in the ordinance it is provided that the curb walls in place on both sides of the roadway shall be plastered on their street face, and the curb stones already in place shall be reset to grade. This same objection was made in the case of Chicago Terminal Transfer Co. v. City of Chicago, supra, when the latter case was heard in this court, but was there held to have been waived because it was not made in the court below. It is true that this objection as to the variance between the description of the improvement in the estimate of the cost and the description of the improvement in the ordinance was made in the present case upon the hearing in the court below. But, under the decisions of this court, this is one of the objections which should have been made in the original proceeding for the confirmation of the assessment, and, not having been made there, cannot be presented here in this collateral proceeding, which is an application for judgment of sale. Under section 66 of the act of 1897, where application is made for judgment against property for delinquent special assessments no defense or objection can be made or heard which might have been interposed in the proceeding to confirm the assessment, and no errors in the proceeding to con-

firm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application therein provided for. If a property owner fails to appear upon the application to confirm an assessment, then, under the plain language of the statute, he is precluded from calling in question any of the proceedings anterior to the judgment of confirmation, except where the court rendering the judgment of confirmation is shown to have been wanting in jurisdiction to do so. Leitch v. People, 183 Ill. 569, 56 N. E. 127; Pipher v. People, 183 Ill. 436, 56 N. E. 84; Perisho v. People, 185 Ill. 334, 56 N. E. 1134. The variance here complained of is a part of the proceedings anterior to the judgment of confirmation, and, inasmuch as it was not complained of in the proceeding for confirmation, it cannot be set up in the present collateral proceeding.

We perceived no error in the rulings of the trial court upon the objections thus brought to our notice, and therefore the judgment of the county court overruling such objections is affirmed. Judgment affirmed.

HOLLAND *v.* PEOPLE *ex rel.* MILLER, County Collector.

(Supreme Court of Illinois, Feb. 20, 1901.)

[59 N. E. Rep. 753.]

Municipal Ordinance—Publication—Clerical Error.—An ordinance for a special tax being correctly published, except as to a mistake of the printer in the number of the township, and it plainly appearing from the whole ordinance as published that the mistake was a clerical one, and that the property abutting the improvement was the property intended to be taxed, the mistake was not fatal to the validity of the tax.

Public Improvement—Bill of Costs—Notice to Abutter.*—A statute required a bill of costs of public improvement, showing in separate items the cost of grading, materials, laying down, and supervision, to be filed in the office of the clerk, and certified to by the officer or board designated to take charge of the improvement, together with a list of lands touching on the line of the improvement, names of the owners, etc. *Held*, that a notice to an abutter, filed with the clerk signed by three persons designating themselves "Committee of Streets and Alleys," notifying him that his land, described as a 40-acre tract, one part of which was contiguous to an improvement, was taxed, etc., and that the total amount was a certain sum, as per items annexed thereto, and attached to which was a column of figures footing up the sum stated to be due, but not showing what the items were, and not certified to, was not a compliance with the statute.

Same—Assessment Roll—Curing Defect—Judgment.—A final judgment ordering that any irregularity in an assessment roll or tax list, or omission or defective act of any officer connected with the assessment or levy of a special tax, "be, and the same are hereby, corrected, supplied, and made to conform with the law," cannot cure the defect in failing to certify the bill of costs as required by statute.

Appeal from Logan county court; James A. McComas, Judge.

See *note* to Thomason *et al. v.* Carroll *et ux.*, *ante*, p. 76.

Holland *v.* People *ex rel.* Miller, County Collector

Action by the people, on relation of Miller, county collector of Logan county, against Oliver W. Holland, for a judgment for municipal improvement taxes and for an order of sale. From a judgment for plaintiff, defendant appeals. Reversed.

Blinn & Harris for appellant.
Baldwin & Stringer, for appellee.

CARTWRIGHT, J. The county collector of Logan county applied to the county court for judgment against part of the N. W. ¼ of the S. E. ¼ of section 18, township 20, range 4 W. of the third P. M., lying along the north side of Lincoln street, in the village of New Holland, for a special sidewalk tax of $166.64, and an order of sale of said premises to satisfy the same. Appellant, who is the owner of said tract, appeared and filed objections, which were overruled; and the court rendered judgment, not against the tract as described by the collector, but against the land as described in an ordinance of the village of New Holland, which is in the record. That ordinance provided that a sidewalk should be built along the north side of said Lincoln street, and be paid for by a special taxation of the lot or parcel of land contiguous to, abutting, and touching upon the line of the said sidewalk, and described the entire 40-acre tract, part of which was south of Lincoln street, and not contiguous to or abutting upon the sidewalk. Appellant excepted to the judgment and prosecuted this appeal.

One of the objections to the special tax was that the ordinance was not published, and this objection is based on a mistake of the printer in the number of the township in the description of the 40-acre tract. Otherwise the ordinance was correctly published, and it plainly appears from the whole ordinance as published that the mistake was merely a clerical one, and that appellant's property contiguous to and abutting on the sidewalk was the property intended to be charged with the tax. The error and the nature of it were apparent from the entire ordinance and other descriptive features of it, so that it was not error to overrule that objection.

The ordinance required the owners of land abutting upon the line of the sidewalk to build it within 30 days, and provide that in default thereof it should be constructed by the village. It was not built by appellant in front of his land, and the village constructed it. The ordinance provided for the levy of a special tax by frontage; and the next step required by the statute in order to charge the property with the tax was that a bill of the cost of the sidewalk, showing in separate items the cost of grading, materials, laying down, and supervision, should be filed in the office of the clerk of the village, certified to by the officer or board designated by the ordinance to take charge of the construction of the sidewalk, together with a list of the lots or parcels of land touching upon the line of the sidewalk, the names of the owners thereof, and the

frontage. This certified bill of cost is the basis for a special tax list to be prepared by the clerk. The ordinance did not designate any officer or board to take charge of the construction, but directed the bill of cost to be certified by the chairman of the streets and alleys committee or the president of the village. The statute and ordinance were not complied with, and no certified bill of the cost of the sidewalk was ever filed. There was a notice to appellant filed with the village clerk, signed by three persons designating themselves "Committee of Streets and Alleys," which notified appellant that the 40-acre tract, the N. W. ¼ of the S. E. ¼ of section 18, was taxed by special tax levied by an ordinance for the cost of a sidewalk abutting on the same; that the total amount of the special tax was $166.64, as per items thereto annexed; and that the tax was due, and, if not paid to the village collector, would be proceeded with according to the ordinance and the statute of Illinois. Attached to this notice was a column of figures footing up $166.64, but not showing what the items were, and it was not certified in any manner. This notice or a bill was presented to appellant by the village marshal, and payment was refused. This paper did not fulfill any of the conditions of a certified bill of cost, and such a certified bill is the foundation of the special tax list to be made by the clerk. If the notice to appellant was of any consequence, it notified him of a tax on the whole 40 acres,—not only that which abutted on the sidewalk, but other land across a railway track and south of the street, which did not abut upon it, and could not be taxed to pay for it. The provision for a certified bill of costs is for the protection of the property owner, and is a necessary step in the levy of the tax. The proofs sustained the objection that this step was wanting, and it was error to overrule it.

Appellee relies upon the final order and judgment of the court to supply the want of a certified bill and other defects in the proceedings. In the final judgment the court orders that the return of the committee on streets and alleys to the village clerk, and the certificate of the village clerk to the county collector, are thereby corrected, supplied, and made to conform to the law, and that "any and every irregularity or informality in the assessment roll or tax list, or in any of the proceedings connected with the assessment or levy of such special tax, or any omission or defective act of any officer or officers connected with the assessment or levy of such special tax, be, and the same are hereby, corrected, supplied, and made to conform to law as by statute in such cases made and provided." Nothing was amended, corrected, or supplied; but the court merely ordered that everything should be all right and in accordance with the law, although it was not so in fact, or made so by amendment or correction. The revenue law is very liberal in allowing irregularities, informalities, or omissions not affecting the substantial justice of the tax to be corrected or supplied upon application for judg-

ment, but it does not authorize the court to levy a tax where none has been levied by the proper officers. The order in this case was beyond the power of the court, and not within the meaning of the statute. It is apparent that the judgment was also erroneous in including the entire 40-acre tract as described in the ordinance. The judgment is reversed, and the cause remanded. Reversed and remanded.

FARRINGTON *v.* CITY OF MT. VERNON.

(*Court of Appeals of New York, March 12, 1901.*)

[59 N. E. Rep. 826.]

Street Improvement—Assessment District—Construction of Ordinance.—N. avenue extended north and south, and P. avenue commenced at the east line of N. avenue, and extended eastward. Resolutions for the improvement of N. avenue described the assessment district as on N. avenue from the north side of P. avenue to the northerly city line. *Held*, that the contention that the property on the west side of N. avenue was not in the assessment district because it was not north of P. avenue cannot be sustained, since the reference to P. avenue was merely to indicate the south boundary of the district, and did not limit it to the property on the east side of N. avenue.

Street Improvement—Grading—Construction of Charter.—Mt. Vernon City Charter, § 186, conferred on the city the power to establish and construct grades and repair streets. Section 182 authorized the common council to determine the expense of grading or paving streets, and to assess the same on lots which front on the street; and section 187 declares that the city shall have power, on the written petition of any interested party, to alter the grade of any street. *Held* that, where the grade of a street had not been previously established, the leveling of it so that it could be improved was not a sufficient alteration to constitute a change of grade, within section 187, as it was not an alteration of an established grade.

Appeal from supreme court, appellate division, Second department.

Action by Charles H. Farrington against the city of Mt. Vernon. From a judgment of the appellate division (64 N. Y. Supp. 863), reversing a judgment entered on the report of a referee in favor of plaintiff, plaintiff appeals. Affirmed.

This controversy concerns North Fourth avenue in the city of Mt. Vernon, which extends north and south, and Primrose avenue, which commences at the east line of North Fourth avenue, and extends east.

Milo J. White, for appellant.
William J. Marshall, for respondent.

MARTIN, J. The purpose of this action was to vacate an assessment for the improvement of North Fourth avenue in the city of Mt. Vernon. It was based upon the theory: (1) That the plaintiff's assessment was upon property not within the assessment district prescribed and established by a resolution of the defendant's common council; and (2) that the

proceeding which resulted in the plaintiff's assessment was a proceeding to change the grade of a street, and the provisions of the defendant's charter relating to such a proceeding were not complied with.

The validity of the first claim depends upon the meaning and effect of certain resolutions defining the extent of the proposed improvement and the district of assessment beyond which no assessment could extend. In those resolutions the improvement and assessment districts were described as on "North Fourth avenue, from the north side of Primrose avenue to the northerly city line." The learned referee before whom this action was tried was of the opinion that, as Primrose avenue did not extend across North Fourth avenue, the assessment district thus described did not include the abutting property on the west side of North Fourth avenue, but only such as abutted that street on the easterly side. He accordingly held that the plaintiff's property was not within the assessment district as thus described, and that the assessment was consequently void. That question was fully discussed by the learned appellate division, which reached the conclusion that the plain intent and purpose of the resolutions was to indicate the points where the improvement and assessment district should commence and end, that the reference to Primrose avenue was simply to fix the southern limit, and that it was not the purpose or effect of the resolutions to confine the assessment district to property on the easterly side of the street. We fully concur in that conclusion. To attribute to the city any other purpose, or to give to the language employed any other interpretation, would be too narrow and technical, if not too absurd, to be sustained. When these resolutions and the proceedings of the common council are considered, they plainly indicate that the southern boundary of the improvement on North Fourth avenue and of the assessment district was intended to commence at a point on that street where Primrose avenue intersected it, and end at the northerly city line, and were intended to include all the lots upon that street on the westerly as well as the easterly side. If there was any ambiguity or uncertainty as to the meaning of the language, it should be so interpreted as to carry into effect the purpose of the resolutions, to be determined upon a consideration of all the words employed, in the light of the facts and circumstances surrounding or accompanying their adoption. When thus considered, it is obvious that the intent and effect of the resolutions were to include in the assessment district the property on both sides of North Fourth avenue between the north side of Primrose avenue and the northerly city line.

This leads to the consideration of the question whether the proceedings which resulted in the assessment complained of were to change the grade of North Fourth avenue, within the meaning and intent of section 187 of the defendant's charter.

We think they were not. The provisions of the defendant's charter relating to the construction, regulation, and grading of its streets, and in relation to the change or alteration of street grades, so far as applicable, may be thus summarized: Section 180 confers upon the city the power to establish the grade, construct, make, grade, regulate, and repair the streets, highways, sidewalks, bridges, sewers, and aqueducts within its limits, or to cause them to be constructed, graded, or repaired. Section 181 relates only to sewers. Section 182 provides that the city may contract for the regulating, grading, paving, or graveling of its streets or highways, and assess upon the several lots of land benefited thereby two-thirds of the expense thereof, in proportion to the benefit that shall arise from such improvement. Then follows the procedure to be adopted in contracting for the work and in making and reviewing the assessment therefor. It further provides that, whenever the common council shall determine to regulate, grade, regrade, or pave any street or highway, or any part thereof, it may direct a curb to be set, and gutters to be made, and that the expense therefor shall be assessed with the expenses of regulating, grading, or paving in the same assessment upon the lots which shall front upon such street or highway. Section 186. These sections confer upon the city express power to establish the grade, construct, make, grade, regulate, and repair its streets, or to cause it to be done. When we refer to section 187, upon which the appellant relies to support this second contention, we find that it provides for the alteration of street grades, and declares that the city shall have power, on the written petition of any party interested, to alter in the manner pointed out the grade of any street or highway, or any part thereof. Then it provides the practice to be adopted, and declares that, if the owner of any building or other structure shall file a claim for damages to such building or structure arising from such alteration, the damages may be estimated by commissioners to be appointed as therein stated, and that they may be awarded, provided the building or structure shall have been built with reference or to conform to a previously established grade. Manifestly, that section has no application to this case, where the defendant has constructed or repaired one of its streets in pursuance of the power conferred by sections 180 and 182 of that act. The change that was made in the grade of North Fourth avenue was to level its surface only so far as was necessary to enable the city to properly construct the street. There was no proof that any grade had been previously established. On the contrary, the evidence was that North Fourth avenue was a mere public highway, and that, to properly construct or repair it, it was necessary to level and grade it to the extent and in the manner it was proved to have been done. That was the only change as to the grade which was made, and falls far short of such an alteration or change as was intended by sec-

tion 187. The obvious purpose of that section was to permit the alteration or change of the general grade of a street which had been previously established, where buildings or other structures had been erected with reference to such grade. In other words, the chief object of that section was to authorize the change of an established grade, and to provide a method of indemnity to persons whose buildings or structures were injured by such general alteration or change. But it has no application where, as a mere incident of an improvement or construction of a street, the leveling of its surface or bringing it to a proper grade is required. We are of the opinion that the proceedings in this case were regular, that there was no such change or alteration of the grade of North Fourth avenue as to bring it within the provisions of section 187, and that the improvement under the previous sections of the defendant's charter was fully authorized. The order should be affirmed, and judgment absolute ordered for defendant, on the stipulation, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and CULLEN, JJ., concur.

Ordered accordingly.

HAUGHAWOUT *v.* HUBBARD *et al.* (L. A. 799.)

(*Supreme Court of California, Feb. 25, 1901.*)

[63 Pac. Rep. 1078.]

Sewer Improvements—Control by Council—Delegation of Powers—Invalid Assessments.—Finlayson, St. Laws, p. 9, § 3, requires the city council, before contracting for sewer improvements, to pass and publish a resolution of intention "describing the work" proposed, and provides that the city engineer shall make plans and specifications and estimates of the cost thereof, which, by *Id.* p. 42, § 5, become part of the contract, to be awarded when approved by the council. *Id.* p. 61, § 6, provides that the work must be done under the direction and to the satisfaction of the superintendent of streets. The ordinance of intention for the work required it to be done in accordance with plans and specifications on file in the city clerk's office, one of which provided that, "when the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." *Held*, that an assessment levied for work done under a contract based on such plans and specifications was not invalid on the ground that such specifications delegated to the street superintendent powers of the council.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Suit by W. J. Haughawout against Laura A. Hubbard and others to foreclose an assessment lien on a certain lot for sewer work. From a judgment in favor of the defendants, plaintiff appeals. Reversed.

H. J. Stevens and A. B. McCutchen, for appellant.

Mulford & Pollard, for respondents.

PER CURIAM. The ordinance for the work requires it to be done "in accordance with the plans and specifications on file in the clerk's office of the city of Los Angeles, said specifications being designated 'C' and 'D.'" The ordinance of intention contains a similar provision. It is claimed by the respondent, in effect, that these specifications delegate to the street superintendent powers vested by the law in the council, and which it had no right to delegate. The specification principally discussed in the briefs, and on the supposed insufficiency of which the decision of the lower court was rested, is as follows: "When the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." The point of the objection is that the power is thus delegated to the street superintendent to determine whether the ground does or does not "afford a sufficiently solid foundation," and, in the latter case, the power to determine the depth of the excavation, and the materials to be used in bringing the bottom of the ditch "to the required level and form." The former objection was overruled by the court below. The latter was sustained on the supposed authority of Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, and cases following it. The other objections are similar, but are of a more trivial character, and were regarded by the lower court as without merit. It is assumed in these objections that, under the provisions of the law relating to the subject, it is the function of the council, in ordering any improvement, to determine in advance all the details of the construction; or, in other words, not only to make the specifications, but to make them so complete as to leave nothing to the discretion or judgment of the street superintendent. But to this view of the law there are several decisive objections: First, the function of making the specifications is not imposed by the law on the council, but on the city engineer. The function of the council with reference to them is merely to order them to be made, and to see to it that they are accompanied by an estimate of the cost of the improvement, and are otherwise satisfactory. Next, the law does not impose, either on the council or the engineer, the impossible task of making the specifications so complete. And, finally, it is the obvious intent of the law to devolve upon the street superintendent a certain discretion with reference to the details of the work. A brief review of the act relating to street improvements, and of the several powers and functions imposed by it on the council and other municipal officers, will establish these propositions.

1. By section 2 of the street-work act the power is conferred on the city council "to order" any of the improvements

therein specified. Finlayson, St. Laws Cal. pp. 5, 9, § 3. This involves the function of determining the nature or general character of the improvement to be made; and this is also implied in the provision that "a resolution of intention" shall be made and published "describing the work," by which is meant not the work or labor to be done, but the improvement or work to be constructed. This function obviously can be performed only by the council; and if it be delegated, either in whole or in part, to the street superintendent, the assessment for the improvement will be void. Bolton v. Gilleran, supra, and cases cited. But the performance of this function does not involve the necessity of determining or describing the details of construction,—a task for which the council is altogether unfitted. This task is devolved by the law on the city engineer, whose duty it is (in the case of sewer work) to make "plans and specifications, and careful estimates of the costs and expenses thereof" (Finlayson, St. Laws, p. 9, § 3), which, when approved, become part of the contract to be awarded (Id. p. 42, § 5). The function of the council with regard to these is simply that of supervision. Ultimately it is its function to determine the cost of the work, and the amount of the tax to be assessed for it (Bolton v. Gilleran, 105 Cal. 248, 38 Pac. 881); and this implies that the specifications must be accompanied by an estimate of the cost definitely determining the amount. But, if the specifications comply with this essential condition, and are otherwise satisfactory to the council, its functions are fulfilled; nor—this condition being fulfilled—is its jurisdiction to order the work in any way affected by any defects in the work of the engineer in preparing the specifications. The provisions of the act in this regard are explicit. On the publication of a sufficient resolution of intention "describing the work," and the lapse of the 25 days,—the intervening conditions having occurred,—the council is "deemed to have acquired jurisdiction to order * * * the work"; and all that is required of it in addition is that it shall require the specifications to be made, and the cost of the work to be thus determined. It is clear, therefore, that the defects, if any, in the specifications, are not to be regarded as defaults of the council in performing its functions; and that the power devolving on the street superintendent by reason of such defects cannot be regarded as a delegation of the powers of the council.

2. Hence the objections made must be regarded as resting simply upon the supposed defects in the specifications, and upon the proposition, assumed to be law, that these may affect the validity of the assessment. But there is nothing in the act to lead us to suppose that this was intended, and, from the nature of the case, a contrary intention must be inferred. The purpose of specifications is, indeed, to determine and prescribe the details of construction; but this can be effected only approximately. To some extent such details must

depend on unanticipated contingencies, and can be determined only by the exigencies of the actual construction. The specifications must, therefore, always fail, more or less, in certainty or completeness of detail; and hence the most accurate and detailed specifications must leave unprovided for many questions arising in the course of the work as to kind and amount of work or materials and other details of construction. The question as to the sufficiency or insufficiency of specifications is, therefore, one merely of degree; that is, not whether they are certain or uncertain, but whether they are more uncertain than is desirable. To this question no general answer can be given; and hence, in the absence of specific provisions of the law, it must be regarded as immaterial to the validity of the assessment.

3. It follows, from the essential nature of all specifications, that many questions as to details must be left to the discretion of the officer superintending the construction,—in this case the street superintendent; and that this must be the case with reference to all details that are in fact not determined by the specifications. This fact is too obvious to have been overlooked by the legislature. Accordingly, it is expressly provided by the act that the work "must in all cases be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent; * * * and all contracts made therefor must contain a provision to that effect." Finlayson, St. Laws, p. 61, § 6. There is thus conferred upon the street superintendent not merely the power to see the specifications carried out, but a power or discretion beyond the specifications. This power is, of course, limited by the contract, and by the specifications as part thereof, but extends to all questions of detail not explicitly determined by the specifications, or the contract; and with reference to such questions his own judgment is by the express terms of the law and of the contract itself made the criterion. General rules may be prescribed by the council directing the exercise of this discretion, but this rather affirms than denies its existence. The cases cited by the court are not inconsistent with this view of the law: In the case of Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, the assessment was, indeed, held to be void on account of defect in the specifications; but the defect was that they did not contain a definite estimate of the cost of the work, but alternative estimates only, of which the one might exceed the other by about 50 per cent. The result was that there was a failure to perform either of the two essential functions imposed by the law on the council, namely, that of determining and describing the nature or general character of the work, and that of determining the amount of the burden to be imposed therefor by assessment on the property of the parties to be charged with the cost. The cases of Stansbury v. White, 121 Cal.

433, 53 Pac. 940, and Chase v. City Treasurer, 122 Cal. 540, 55 Pac. 414, were decided solely on the authority of Bolton v. Gilleran, and must be regarded as mere applications of the principle of that decision. Fisher v. Prince, 3 Burrows, 1364; Osborne v. Rowlett, 13 Ch. Div. 785. In the former case the decision in Warren v. Chandos, 115 Cal. 382, 47 Pac. 132, is cited to the proposition that "a contract which gave to the superintendent of streets the power to increase or diminish the cost of the improvement after the contract had been entered into by requiring a greater or less amount of material for its completion as he should determine, * * * [would render] the assessment invalid." Whether the contract in the case under consideration was of that character or otherwise does not appear from the report, but it seems that authority was given to alter the specifications, which is not the case here. In Chase v. City Treasurer, 122 Cal. 540, 55 Pac. 414, the case was decided mainly on the grounds of insufficient publication of the resolution of intention. The specifications are referred to briefly, but are not set out, or their effect stated. It results from what has been said that on the facts found the judgment should have been for the plaintiff. The judgment is, therefore, reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the plaintiff.

JOHNSON *et al. v.* PEOPLE *ex rel.* RAYMOND, County Treasurer.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. Rep. 515.]

Special Assessment — Defective Ordinance — Sale — Judgment — Collateral Attack.—An ordinance for special assessment for paving streets, which did not specify the quality and dimensions of the "flat stones" on which the curbstones were to rest, though defective, was not void, and was no ground for objections to a judgment of sale of land for nonpayment of assessments.

Appeal from Cook county court; O. N. Carter, Judge.

Application by the people, on relation of S. B. Raymond, county treasurer, for an order for the sale of land belonging to Nels Johnson and others for the nonpayment of a special assessment. From a judgment ordering sale, defendants appeal. Affirmed.

Ives, Mason & Wyman, for appellants.

Chas. M. Walker, Corp. Counsel, Armand F. Teefy, and William M. Pindell, for appellee.

HAND, J. This is an appeal from a judgment for sale of certain real estate entered by the county court of Cook county upon the application of the county treasurer and ex officio collector of said county. Application was made to the July term,

1899, of said court for judgment for the sale of the lands of appellants for the nonpayment of the second installment of a special assessment levied against said lands by authority of the city of Chicago to pay for the paving of West Eighteenth street, in said city, from California avenue to Western avenue. Appellants appeared and filed objections to said application, upon the ground that the ordinance upon which the special assessment was based did not sufficiently describe the nature, character, locality, and description of the proposed improvement, in that it did not specify the quality and dimensions of the flat stones upon which the curbstones were to rest. The court overruled the objection, and entered judgment.

A judgment of confirmation of a special assessment cannot be collaterally attacked except for matters going to the jurisdiction of the court to render the judgment. Steenberg v. People, 164 Ill. 478, 45 N. E. 970; People v. Lingle, 165 Ill. 65, 46 N. E. 10; Walker v. People, 169 Ill. 473, 48 N. E. 694; Gross v. People, 172 Ill. 571, 50 N. E. 334; Foster v. City of Alton, 173 Ill. 587, 51 N. E. 76; Blount v. People (Ill. Sup.) 59 N. E. 241. In Walker v. People, supra, we say (page 474, 169 Ill., and page 694, 48 N. E): "It is not a defense to an application for judgment on a delinquent list to say that the ordinance was invalid because it failed to state the nature, character, locality, and description of the improvement, unless the failure to comply with the requirement of the statute in that regard is such as to render the ordinance absolutely void." The ordinance in this case, though defective, is not void. Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306. The court had jurisdiction to render the judgment of confirmation, and the same is binding upon the appellants, and cannot be questioned by them in this proceeding. The judgment of the county court is affirmed. Judgment affirmed.

WILLIS *v.* CITY OF CHICAGO.

(Supreme Court of Illinois, Feb. 20, 1901.)

[59 N. E. Rep. 543.]

Street Improvements—Special Assessments—Sufficiency of Ordinance Authorizing.—A city ordinance authorizing the laying of a combined curb and gutter with a center foundation 6 inches in depth, the curb to be 6 inches in thickness throughout, and the gutter flags to be 18 inches in width, the top of the curb to be at the established grade of the street, was insufficient to authorize a judgment confirming a special assessment, since it does not specify the height of the combined curb and gutter.

Error to Cook county court; O. N. Carter, Judge.

Special tax proceeding by the city of Chicago against Charles G. Willis and others. From a default judgment of confirmation, defendants bring error. Reversed.

Willis *v.* City of Chicago

William F. Carroll, for plaintiffs in error.

Charles M. Walker, Corp. Counsel, and Denis E. Sullivan, Asst. Corp. Counsel, for defendant in error.

WILKIN, J. This is a writ of error to the county court of Cook county to review the proceedings in that court confirming a special assessment against the property of plaintiffs in error. The assessment was made by the city of Chicago to pay for curbing with combined curb and gutter, and paving, Drexel avenue from Seventy-First street to South Chicago avenue, and a system of streets. The judgment of confirmation was entered July 22, 1896, by default. One of the grounds of reversal is that the ordinance authorizing the assessment is void for a failure to specify the nature, character, location, and description of the improvement, the principal objection to it being that it does not specify the height of the combined curb and gutter. The ordinance is as follows: "Granite concrete combined curb and gutter, with a foundation of cinders six inches in depth, shall be laid on each side of said roadway. Said curb shall be six inches in thickness throughout, and the gutter flags shall be eighteen inches in width. The top of said curb shall be at the established grade of said street; the roadways of each of said above-named streets between the limits given on each, between said gutter flags, to be filled to within nine and one-half inches of the grade of the pavement with sand, etc. Upon the roadway thus prepared shall be laid a bed of hydraulic cement, etc. The final surface of the pavement shall conform to the established grade of said street between said points, as shown by an ordinance fixing the grade of said streets now on file in the office of the city clerk of the city of Chicago." It is insisted on behalf of the plaintiffs in error that this identical ordinance was before us in the cases of Lundberg v. City of Chicago, 183 Ill. 572, 56 N. E. 415, and Beach v. Same, 186 Ill. 208, 57 N. E. 1129, in each of which cases the ordinance was held insufficient to give the court jurisdiction to render a judgment confirming special assessments made under it. And this is conceded to be true by counsel for the city, their contention, however, being that the decisions in those cases were made without the attention of the court being called to the language in the ordinance, "the top of said curb shall be at the established grade of said street." In this, counsel are in error. In the former of the above cases the defect in the ordinance was shown to be in failing to give the "depth of the gutter or corresponding height of the curb, or to furnish any data from which it can be determined." The trouble with the ordinance is that it gives data from which the top of the curb can be ascertained, but gives no means of ascertaining the bottom of it. The top is the grade of the street, but the bottom or lower edge of the curb may be one foot or two feet below the grade, for anything shown in the ordinance. The defect is not

precisely the one condemned in the ordinance before us in Holden v. City of Chicago, 172 Ill. 263, 50 N. E. 181, but, in effect, it is the same. There the language of the ordinance was: "The gutter flags shall be eighteen inches in width, and laid to a pitch corresponding with the angle towards the crown of the street," etc. The bottom of the gutter might have been ascertained by reference to the grade ordinance, but there was nothing to show at what height the top of the curb should be, and practically the same defect appeared in that ordinance as in this. There is nothing here from which the depth of the curbstone can be ascertained.

It is insisted that the ordinance is good under the decisions in Lehmers v. City of Chicago, 178 Ill. 530, 53 N. E. 394, and Claflin v. Same, 178 Ill. 549, 53 N. E. 339. It is, perhaps, true, that upon first impression these cases would seem to be in conflict with the later cases of Lundberg v. Same, and Beach v. Same, supra; but an examination of the ordinances in the Lehmers and Claflin Cases will show that they were materially different from the one now under consideration. In the Lehmers Case the ordinance contained the language: "Said curb and gutter shall be six inches in thickness throughout, and the gutter flag shall be eighteen inches in width, and laid to a pitch corresponding with the angle towards the crown of the street. * * * The top of said curb shall be at the established grade of said Humboldt avenue. * * * The final surface of the pavement shall conform to the established grade of said Humboldt avenue between said points, as fixed by an ordinance now on file in the office of the city clerk of the city of Chicago." In the Claflin Case the ordinance provided: "That the surface of the pavement at the center of the street shall conform exactly to the established grade of said Harding avenue, and shall descend to the gutter line with a pitch of one inch to each three feet; that the gutter flags shall be eighteen inches in width, and have a pitch corresponding to the crown of the street; and that the top of the curb shall be at the said established grade of Harding avenue. It therefore appears that in both of said cases the ordinance furnished the data from which the depth of the gutter could be definitely ascertained; that is, both the top and lower edges of the curbstones could be ascertained. We do not see wherein this ordinance is more certain in its description of the height of the curb than was the one in the case of Holden v. City of Chicago, supra, and on the authority of that case and Lundberg v. Same and Beach v. Same, supra, we must hold that it was insufficient to authorize a judgment confirming the special assessment therefor.

There is also another fatal objection to the judgment below. The affidavit of mailing notices of the final hearing upon the assessment is fatally defective, but, in view of what we have said, it is unnecessary to discuss that point. We think, how-

ever, that counsel for defendant in error, in their argument upon this branch of the case, failed to distinguish between a direct proceeding, as this is, and a collateral proceeding. The judgment of the county court must be reversed, and the cause remanded. Reversed and remanded.

BROWN *et al.* *v.* TOWN OF UNION.

MORGAN *et al.* *v.* SAME.

(Court of Errors and Appeals of New Jersey, March 4, 1901.)

[48 Atl. Rep. 562.]

Sewer Assessment—Levy—Certiorari.—Whenever a sewer has been constructed in any municipality of this state at public expense, and the assessment levied for benefits thereby conferred has been removed by certiorari to the supreme court, the act of March 23, 1881 (Gen. St. p. 3404), and the act of February 19, 1895 (Gen. St. p. 2138), authorize that court to levy upon the property of the prosecutors an assessment for such benefits, in accordance with the directions of said act of 1895. (Syllabus by the Court.)

Error to supreme court.

Certiorari by the state, on the prosecution of John Crosby Brown and others, and James G. Morgan and others, against the town of Union to review the validity of a sewer assessment. Certifying proceedings affirmed (40 Atl. 632), and prosecutors bring error. Affirmed.

Abel I. Smith & Mabon and Chas. L. Corbin, for plaintiffs in error.

Horace L. Allen and R. V. Lindabury, for defendant in error.

DIXON, J. These writs of error bring up a judgment of the supreme court by which that court, having under review by certiorari an assessment for the construction of sewers in the town of Union, and finding it to be substantially correct, adopted the assessment as its own, under the act of March 23, 1881 (Gen. St. p. 3404, § 547). In City of Elizabeth v. State, 45 N. J. Law, 157, this court upheld that act as a valid remedial statute, and adjudged that it required the supreme court, whenever an assessment for a public improvement was brought before it on certiorari, to see that a proper assessment was levied, if at the time of adjudicating on the original assessment a lawful assessment could be made. In view of this decision, the only duty now incumbent on this court is to determine whether, when the supreme court rendered its judgment, an assessment could lawfully be levied upon the lands of the plaintiffs in error for the construction of the sewer in question. If it could, then, as no error in law is assigned upon the procedure of that court, its judgment must be affirmed. The act of February 19, 1895 (Gen. St. p. 2138), read in connection with the said act of March 23, 1881, affords

the requisite authority. The manifest intent of that act is that, whenever sewers are constructed in any municipality at public expense, and special benefit accrues therefrom to private lands within the corporate limits, an assessment for the benefit shall be imposed on such lands, and the act prescribes constitutional regulations for the levying of such an assessment. The validity of this statute has already been adjudged by this court. Improvement Co. v. City of Bayonne, 56 N. J. Law, 297, 28 Atl. 713; Vreeland v. City of Bayonne, 60 N. J. Law, 168, 37 Atl. 737. The sewers now in question were constructed within the town of Union at the expense of the town, and conferred upon the property of the plaintiffs in error such special benefit, present or prospective, as the act of 1895 contemplates. If the act under which the sewers were built (Gen. St. p. 3546, § 239) be, as it is urged, special and unconstitutional, still the reception of this benefit is a sufficient basis for the imposition of a corresponding burden, when the legislature provides the proper agency and rules for assessing the same. City of Elizabeth v. State, ubi supra. The appropriate rules are given in the act of February 19, 1895, and the act of March 23, 1881, constitutes the supreme court the agent required. The judgment of the supreme court should be affirmed.

DUMESNIEL *v.* LOUISVILLE ARTIFICIAL STONE CO. (two cases). ORMSBY *v.* SAME (two cases). NICHOLS *v.* SAME.

(Court of Appeals of Kentucky, Sept. 19, 1900.)

[58 S. W. Rep. 371.]

Local Assessments—Effect of Irregularities in Improvement Proceedings.—Under the statute of Kentucky securing to the contractor doing street improvement work payment for his work when it is done pursuant to the ordinance or contract, and providing that payment for the work may be enforced upon the abutting property bound therefor by proceedings in court, where such work has been done according to the contract the owners of abutting property assessed for its cost cannot escape payment of the assessments because of irregularities in the proceedings for making the improvement, unless they were prejudiced thereby; and therefore in an action to enforce liens created by such statutes for the cost of such work, where the complaining property owners were not injured thereby, it was immaterial that all the work specified in the ordinance under which the improvement in question was made was not included in one contract, or that two lots on one square were excepted out of the operation of the contract.

Same—Necessity for Improvements—Province of Court.— The contention that the reconstruction in question was unnecessary, as the existing sidewalks were good was not sufficiently sustained by the evidence to justify a court of equity in interfering with the decision of the municipal authorities on the subject.

"To be officially reported."

Actions by the Louisville Artificial Stone Company against Mary Dumesniel and others to enforce liens for the cost of

street improvements. Judgment for plaintiff, and defendants other than the city of Louisville appeal. Affirmed.

Wm. Mix, for appellant Dumesniel.
Grubbs & Morancy, for appellant Ormsby.
Simrall & Doolan, for appellant Nichols.
Barnett, Miller & Barnett, for appellees Louisville Artificial Stone Co.
H. L. Stone, for appellee city of Louisville.

HOBSON, J. These five cases have been heard together, as they arise on the same record, and involve similar questions. On March 12, 1894, the general council of the city of Louisville made an ordinance requiring the sidewalks on both sides of Oak street, between Third and Seventh streets, in front of lots numbered from 300 to 631, inclusive, to be regraded, recurbed, furnished with metal gutters, and repaved with artificial stone, hexagon block pavement. Pursuance to this ordinance a contract was made on May 8, 1894, between the city of Louisville and the Louisville Artificial Stone Company, for the reconstruction of the sidewalks on Oak street between Fifth and Sixth streets, excepting that in front of lots 501 and 503; and on the same date a separate contract was made between the same parties for the reconstruction of the sidewalks on Oak street between Sixth and Seventh streets. Work was begun under these contracts, but the owners of the property along the street protested against the improvement being made. Finally a public meeting was held, at which the mayor was present, and agreed not to let any more contracts for the rest of the work specified in the ordinance. It would seem that he understood this to be in the nature of a compromise, and that in consideration of this concession by the city the property owners were to allow the work that had been contracted for to proceed. But the property owners do not appear to have had this understanding, and filed suits to enjoin the work being done under the two contracts that had been made. The ground upon which the injunction was sought was that the existing sidewalks were sufficient, and their reconstruction was unnecessary. These suits were decided against the property owners, and the contractor carried out the contracts. Appellants failed to pay their apportionments for the work, and, suit having been instituted against them by the contractor, resisted recovery on the grounds (1) that the reconstruction was unnecessary, as the existing sidewalks were good; (2) that, though the ordinance required the reconstruction of the sidewalks from Third to Seventh streets, nothing had been done except between Fifth and Sixth streets; (3) that lots 501 and 503 were excepted out of the contract, and the pavement in front of them was not reconstructed.

It appears from the record that both the contracts were made on behalf of the city by the board of public works,

signed by the mayor, and approved by the general council. It also appears that the work done by the contractor was in accordance with the contract, that it was accepted by the city engineer, that the amount payable by each property owner was apportioned by him, and that the apportionment was approved and adopted by the general council. If, therefore, there was any error or irregularity in the proceedings, it was that of the general council, and not of any subordinate. Section 2834, Ky. St., provides: "A lien shall exist for the cost of original improvement of public ways, for the construction and reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done, as required by either the ordinance or contract; but the general council or the courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned." The plain purpose of this statute was to secure to the contractor payment for his work when done pursuant to the ordinance or contract. Uncertainty as to payment might be the cause of great loss to the property owners, from the fact that contractors, to cover possible losses from this cause, would be unwilling to undertake work as low as they might otherwise do, if there was no uncertainty about the pay. Previous to this statute, from defects in the proceedings, grave losses were sometimes sustained by contractors, although they had faithfully performed their contract. The statute was passed to remedy these evils, by securing to the contractor in his pay where he had faithfully performed his contract, and seems conclusive of the case at bar. It is admitted that the pavement made by the contractor is all right, and really a nice improvement to the property. Whatever irregularities may have been in the proceedings, the work having been done according to the contract, the contractor must be paid. It is immaterial that all the work specified in the ordinance was not included in one contract; or that part of it has not been let at all, or that two lots on one square were excepted out of the operation of the contract. It does not appear that by any of these things appellants were prejudiced. In a case where such proof is made, the court has full jurisdiction to do justice to the parties, by correcting the apportionment, or making such orders in the premises as the equity of the case may demand. But, nothing of that sort being shown, the court below properly gave judgment on the apportionment as made by the general council. The cases sustaining such defences in suits of this character rest upon statutes materially different from the one quoted. While the proof is conflicting as to the condition of the old sidewalk when it was torn up, and the

preponderance of the evidence would show that it was not, at least, in a bad condition, still it had been down for 22 years, and there is nothing in the proof to establish such a state of case as to justify a court of equity in interfering with the decision of the general council in a matter which the law has confided to its jurisdiction. Judgment affirmed.

CITY OF KANSAS CITY *v.* SMILEY (HORSTMAN *et al.*, Interveners).

(*Supreme Court of Kansas, April 6, 1901.*)

[64 Pac. Rep. 613.]

Municipal Improvements—Assessments—Premature Injunction.—Where a city of the first class is proceeding to construct a sewer, and, having declared such improvement necessary, has let a contract for the work, but has not apportioned the cost of the same, or caused any tax to be assessed against the lots within the sewer district, an action by an owner of real estate in such district, brought to enjoin the city from levying against his property assessments or taxes for the cost of such improvements, is prematurely commenced, and cannot be maintained.

(Syllabus by the Court.)

Error from district court, Wyandotte county; E. L. Fischer, Judge.

Action by William R. Smiley against the city of Kansas City. A. Horstman and another intervened. Judgment against plaintiff and in favor of interveners, and the city brings error. Reversed.

This action was commenced on the 20th day of February, 1900, by William R. Smiley, as plaintiff, to enjoin the city of Kansas City from building a general sewer in subsewer district No. 8 in sewer district No. 5, in the city of Kansas City, Kan. A few days after the commencement of said action by said William R. Smiley, the defendants in error, Horstman and Kirby, were allowed to intervene and to file separate answers therein, in which they asked for an injunction against the construction of said sewer, and against the levy of assessments upon their property to pay for the construction of the same. The action was tried on the 29th day of April, 1900, and at the trial the original plaintiff, Smiley, abandoned the prosecution of the suit commenced by him. Judgment was rendered by the court against said Smiley and in favor of the interveners, Horstman and Kirby, enjoining the city and the contractor, T. J. Enright, from constructing said sewer, and the city from levying assessments or taxes for the cost thereof against the property of said A. Horstman and S. S. Kirby, or any other persons. The court made findings of fact, from which it appears that the city had let a contract for the construction of such sewer, and had taken the usual preliminary steps for the construction of the same, but had not apportioned or

attempted to assess a tax upon any of the real estate liable to be assessed and taxed for the construction of such sewer; finding No. 19 being as follows: "There is no evidence in this case that any assessment had been levied upon any property for the payment of the cost of the construction of the sewer in controversy."

T. A. Pollock and F. D. Hutchings, for plaintiff in error. Miller, Buchan & Morris, J. A. Smith, and Cowden & Snell, for defendants in error.

ELLIS, J. (after stating the facts). This action was prematurely brought. The court below properly held that the original plaintiff, Smiley, could not maintain his action, and the defendants, Horstman and Kirby, can have no standing in court for the purpose of contesting generally the right of a city to construct a proposed improvement, but can only be heard to complain when their personal rights are jeopardized. In this case the city has not apportioned the cost of constructing the proposed sewer upon the real estate lying in the district, and may never do so. It has not assessed any tax upon the property of the interveners, and it cannot now be known that such a tax will ever be levied. At the time this action was commenced the danger of injury to the interveners "was too remote and problematical to warrant the granting of an injunction," and the action, therefore, cannot be maintained. Mason v. City of Independence, 61 Kan. 188, 59 Pac. 272, and cases cited. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with this opinion. All the justices concurring.

MAYOR, ETC., OF TOWN OF NEW IBERIA *v.* WEEKS *et al.*

(No. 13,726.)

(*Supreme Court of Louisiana, Dec. 17, 1900.*)

[29 So. Rep. 252.]

Municipal Improvements—Assessments—Ultra Vires.—The authority to impose the burden of the construction and repair of sidewalks and curbings upon abutting property not being expressly conferred at the present time by the law and the charter of the corporation of New Iberia, nor derived from the terms of the same by necessary implication, a municipal ordinance directing such imposition is *ultra vires* and void.

On Rehearing.

Errors of Municipal Agents—Determination.—Consideration will be extended to municipal corporations with respect to the errors of omission and commission of their representatives, and particularly where a question presented as to one citizen and property holder exists as to all other holders of real estate within the corporate limits, and should therefore be determined upon the basis of a rule which will bear equally upon all.

(Syllabus by the Court.)

Mayor, etc., of Town of New Iberia *v.* Weeks

Appeal from judicial district court, parish of Iberia; T. Don Foster, Judge.

Action by the mayor and board of trustees of the town of New Iberia against Miss Harriet Weeks and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Voorhies & Voorhies, for appellants.

Andrew J. Cammack, for appellees.

BLANCHARD, J. Plaintiffs sue to recover of defendants, jointly and severally, an amount expended in the construction of a sidewalk and curbing along the front of property owned by them jointly. An ordinance of the town council is pointed to as authorizing the demand made. This ordinance makes it incumbent upon property holders to construct and keep in repair the curbings and sidewalks along streets in front of their property. It is provided that when, in the judgment of the street committee, a sidewalk or curbing should be constructed or repaired, and they so determine, the mayor is to notify the property owner to construct the same or repair the same, as the case may be, within 20 days. This notice must be in writing. If the construction or repairing is not done by the owner within 20 days, it is made the duty of the mayor to have it done at the expense of the owner. A bill of the cost is then to be presented to the owner, and, if he does not pay the same within 10 days, the ordinance directs that suit shall be brought. The allegation is made that the street committee judged it necessary that a new sidewalk and curbing should be constructed along the front of defendants' property, and having so determined, the notice required by the ordinance was served upon them; that, notwithstanding this notice, defendants failed and neglected to have the work done; that after the lapse of the 20-days delay the town authorities proceeded to construct the improvements mentioned, and paid for the same; and that due demand had been made in vain upon defendants for reimbursement. There was judgment for plaintiffs, and defendants appeal. The defense against the action is that a municipal corporation can exercise only such powers as are granted to it expressly in its charter, or derived from the terms of the same by necessary implication; that under the charter of plaintiff corporation no grant of authority to it, expressly or impliedly, exists, sanctioning such an ordinance as the one referred to; and that the ordinance, assuming powers not granted, is ultra vires, illegal, and void.

Opinion.

Plaintiffs refer the court to Act No. 130 of the Acts of 1898, as being the present charter of the town of New Iberia. An examination of the act shows it is one amendatory of previous acts of the general assembly relating to the town and its government, and also of certain sections of an amended charter of the town adopted by vote of the people at an election held on the 28th of December, 1880. No copy of this charter adopted

by the people appears in the transcript. Indeed, no reference is made on behalf of plaintiffs to any charter or grant of authority to the municipality, other than the act of 1898. An attentive reading of that act fails to reveal, either directly or by implication, the vesting in the town or town authorities of any such power as that claimed for the enactment and enforcement of the ordinance in question. In fact, the language of the statute appears rather to withhold from than to grant to the municipality the authority to impose the burden of the construction and repair of the sidewalks of the town upon the owners of abutting property. The intention seems to have been that the expense of improvements of this character should be a charge upon the common treasury. For instance, we find this: "It [meaning the municipality] shall have the power and right of raising money by imposing and levying taxes and licenses upon all kinds of property, movable and immovable, and [on] all persons, associations of persons, and corporations pursuing any trade, profession, business or calling, except such as may be exempt from taxation and licensed under the constitution of the state, which money so raised shall be applied *to the improvements of the town*, to maintain the police thereof and an efficient fire department, *to making openings and repairing streets, sidewalks and bridges in and around the town, and to making and repairing every other improvement which said corporation may deem necessary and proper*, and to all other purposes to which the board [of trustees] may be authorized to apply them by the corporation charter." (Italics ours.) Section 1, Act No. 130 of 1898. It indubitably appears from this that the authority conferred upon the corporation is the right only to levy a general tax for and on account of the constructions, improvements, and repairs mentioned; the cost of same to be paid for out of moneys derived from this general taxation. Not a word there or elsewhere in the charter to the effect that the cost of putting down a sidewalk and its curbing may be assessed against the abutting property or its owner. This would be in the nature of a forced contribution, and for it there must be undoubted authority delegated to the municipality, which is, at last, but an agency of the sovereign power. It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. This power must be given either in express terms or by necessary implication, and it is not to be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience, expediency, or advantage. Dill. Mun. Corp. (3d Ed.) § 763. The authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued. Id. As the authority to levy taxes or

to make local assessments does not exist, unless conferred by some provision of the constitution or by an act of the legislature, so it can be exercised no further than it is clearly given; and, if the mode in which the authority shall be exercised is prescribed, that must be pursued. Id. § 769. Since, therefore, all the powers of the corporation are derived from the law and its charter, it is evident that no ordinance or by-law of the corporation can enlarge the same. It follows that, the authority to impose contributions or exactions upon abutting property to meet the expense of sidewalks and curbings being withheld by the law and its charter, the town of New Iberia and its mayor and board of trustees had no warrant to enact the ordinance upon which the demand of this suit is predicated. See Fayssoux v. Succession of De Chaurand, 36 La. Ann. 547; Paving Co. v. Watt, 51 La. Ann. 1345, 26 South. 70. Act No. 136 of 1898, entitled "An act for the creation and government of municipal corporations throughout the state and defining their powers and duties," etc., has no applicability to the corporation of New Iberia, for the reason that the electors of the town have never voted to bring the municipality under the provisions of the act, as required by section 40 thereof. Neither can the corporation act in this instance under the authority of Act No. 127 of 1890, which is a general law conferring powers on municipal corporations, and limited to certain purposes, for the reason that section 6 thereof expressly excludes the space allotted for sidewalks or banquettes from the operation of the statute.

The judgment appealed from is erroneous, and must be reversed. Accordingly it is ordered and decreed that the same be avoided and annulled, and that the demand of the plaintiffs be rejected, with costs in both courts.

On Application for Rehearing.
(Feb. 4, 1901.)

MONROE, J. Counsel for plaintiffs, in his brief for rehearing, says: "The plaintiffs and appellees * * * contend that the judgment * * * just rendered in this case is erroneous, not through any fault of this court, or through any fault or negligence of the plaintiffs, * * * but for the reason that the clerk of the lower court, through an error on his part, believing that Act 130 of the Acts of the General Assembly [of 1898] * * * contained the entire charter of the town of New Iberia, referred this honorable court to that act, instead of including in the transcript the amended charter of the city of New Iberia, as introduced in evidence upon the trial, which charter confers upon the mayor and trustees of the town of New Iberia the right to compel property owners to build sidewalks in front of their respective properties at their own expense. Your honors will note that since your decision in this case the plaintiffs, for the first time having learned that the charter of the town of New Iberia was omitted from the transcript of appeal, have secured the sworn state-

ment of the deputy clerk of court who made the transcript, showing how the omission occurred, and also the sworn statement of the attorney, showing that it was impossible for him or the plaintiffs in this suit, whom he represented, to know that the transcript of appeal did not contain the charter of the town of New Iberia; and to these affidavits is annexed a copy of the amended charter of the city of New Iberia, as it was introduced in evidence in this suit upon the day of the trial. Plaintiffs further contend that a rehearing should be granted for the reason that amendment 4 of the amended charter of the city of New Iberia, which was adopted by a vote of the people on the 28th day of December, 1880, and which section has not been modified or altered by any subsequent enactment, and which was re-enacted in section 1, Act 33 of 1900, confers the necessary powers upon the municipal authorities to compel property owners to build their sidewalks at their expense," etc. The appended affidavit of the clerk sets forth that, through error, he omitted to include in the transcript the amended charter of the town of New Iberia, "which was introduced in evidence on the trial, * * * believing that Act 130 of 1898 included the entire charter of that town, and that the transcript, when made, was handed to the appellants, and was not submitted to the appellees, who are not responsible for the omission mentioned." And he attaches to his affidavit a pamphlet which he describes as a certified copy of the amended charter of the city of New Iberia. The affidavit of the counsel for the appellees states that upon the trial in the lower court he introduced in evidence the amended charter of the city of New Iberia, "which is printed in pamphlet form," and that the clerk omitted the same from the transcript without his knowledge, and that he did not know of such omission until the case had been decided in this court. He therefore prays for a rehearing, and also asks that this court consider the evidence thus supplied as though it had been included in the original transcript. The transcript was completed October 16, 1900, and filed in this court November 14th, and the brief of the counsel was filed upon December 6th, following. There would seem to have been ample time, therefore, within which the counsel might have ascertained whether the transcript as thus filed contained the principal evidence upon which he relies; and we are of opinion that it was incumbent upon him, as a prerequisite to the argument of the case, to inform himself upon that subject. Aside from this, the note of evidence which we find in the record, taken in connection with the indorsements upon the pamphlet called "The Amended Charter of the City of New Iberia," which is attached to the application for rehearing, makes it a question of some doubt as to what was intended to be introduced or filed in evidence at the time of the trial, and we are inclined to think that this question was improperly left to be determined by the clerk. The note of evidence

reads: "Introduced. Certified Copy of Amended Charter of New Iberia, marked 'J.' " And at another place in the transcript we find the following entry, to wit: "Amended Charter of the City of New Iberia. See act of general assembly of the state of Louisiana of 1898. Filed in evidence, in re 3,392, marked 'J.' " The transcript, however, contains no charter of any kind, amended or otherwise, and no agreement to the effect that the acts of the general assembly should be referred to in the bound volumes; and that it was not intended that they should be so referred to follows from the fact that what purports to be the amended charter of the city of New Iberia was offered in pamphlet form, and the offer thus made is relied on as the basis of the present application for rehearing. Examining the pamphlet in question, which is said to be the identical one offered, introduced, and filed on the trial, we find: First, that it is not certified, though the offer calls for a "certified copy"; second, that, while it bears the indorsement, "Filed in evidence July 11th, 1900, in re Mayor & Board of Trustees vs. Harriet Weeks et als., No. 3,392, marked 'Pltff. J.,' " it also bears the indorsement, in the same handwriting, "Received Dec. 26th, 1900," and neither of these indorsements has any signature attached. The face of the document does not, therefore, show that it was filed at date of the trial, but rather indicates that it did not reach the hands of the clerk of the trial court until after the transcript of appeal had been lodged in this court. But not only is the pamphlet not certified, which assuredly was not the fault of the clerk, and not only does it not appear to have been filed, but it does not contain the law upon which the plaintiff relies; the particular section in question having been amended and re-enacted as section 1 of Act No. 33 of 1900, which act it is not pretended was either offered, introduced, or filed in evidence, or referred to or relied on in argument. The question presented, however, is one which, while affecting in the instant case the municipal corporation in its relations with only a single citizen, really exists as to every owner of real estate within the corporate limits. It is therefore particularly desirable that it should be correctly determined, in order that the rule to be established shall bear upon all alike. Under these circumstances, and in view of the established precedents authorizing especial consideration to be extended to municipal corporations, the final judgment herein rendered will be so far amended as to make it a judgment of nonsuit. Millaudon v. First Municipality, 1 La. Ann. 215; Delabigarre v. Second Municipality, 3 La. Ann. 230; Police Jury v. McDonogh, 4 La. Ann. 352; Hassard v. Second Municipality, 7 La. Ann. 495; Carondelet Canal Nav. Co. v. City of New Orleans, 44 La. Ann. 396, 10 South. 871; City of New Orleans v. Werlein, 50 La. Ann. 1256, 24 South. 232. And it is so ordered. Rehearing refused.

BREAUX, J., takes no part.

HARDIN *v.* MCGREEVY.

(Supreme Court of Arkansas, April 6, 1901.)

[63 S. W. Rep. 51.]

Condemnation Proceedings—Sale for Assessed Benefits—Redemption.—Plaintiff paid certain taxes levied against defendant's property for sewerage benefit, securing therefor a tax certificate, and also paid the state and county taxes on the property. Defendant redeemed within the required time from the state and county tax sale, plaintiff not informing defendant as to the certificate for the sewerage improvements, of which defendant was ignorant. The next year plaintiff paid the state and county taxes on the property, and when defendant sought to redeem the same he refused to accept the redemption, claiming absolute title under the certificate for the sewerage benefits; the period for redemption on such certificate having expired. *Held*, on plaintiff's motion for a deed of the property, that by accepting the redemption money for the state and county taxes, while holding the certificate for the sewerage tax sale, he was estopped from claiming title under such certificate.

Appeal from circuit court, Sebastian county, in chancery; Styles T. Rowe, Judge.

Condemnation proceedings by the board of improvement of sewer district No. 1, of Ft. Smith, against Nathaniel Carter and others, in which A. E. Hardin, as a purchaser of certain lots at the improvement sale, filed his motion for a deed to said lots, and the cancellation of an entry on the margin of the record of judgment showing a redemption of said lots, which motion was opposed by Edward McGreevy, owner of the lots. From an order denying the motion, Hardin appeals. Affirmed.

Mechem & Bryant, for appellant.
Hill & Brizzolara, for appellee.

BUNN, C. J. The board of improvement of sewer district No. 1, of Ft. Smith, brought suit against Nathaniel Carter and others, under section 5341, Sand. & H. Dig., and obtained judgment of condemnation and order of sale of certain property in said sewer district for the nonpayment of the assessment thereon. Among the property so condemned and ordered sold were lots 7, 8, 9, 10, 11, and 12, in block 612, Reserve addition to the city of Ft. Smith, owned by the appellee, Edward McGreevy, a nonresident, whose agent at Ft. Smith for the payment of his taxes was one C. E. Brogan. The notice to McGreevy, as a nonresident party to the suit, and judgment and order of sale, were all legally and properly had. The sale was advertised and made on February 3, 1898, and at the sale the appellant was purchaser of the above lots, and obtained certificate therefor. On April 17, 1899, he filed his motion in the above cause of the board of improvement against Nathaniel Carter et al., with his certificate, praying the court to direct the commissioner to make a deed to said lots, and that an entry appearing on the margin of the record of judgment showing a redemption of

said lots on April 3, 1899, be canceled and held for naught. To this motion Edward McGreevy appeared by attorneys, and filed answer alleging redemption of the lots within one year from the confirmation of the sale, and also that the lots were not properly advertised for sale, and that the purchaser (appellant) was estopped from asserting his right to a deed. The motion and response were heard on two agreed statements of facts, which constituted all evidence in the case. The first is as follows, viz.: "That said Edward McGreevy was owner of said lots, which were located in plaintiff's (board of improvement's) district; that an assessment for the benefit of the improvement was made on said lots in common with other lots within said district, which assessment was not paid, and in August, 1897, said board brought above-entitled cause to condemn said lots, together with other property to be sold to pay the assessment; that on October 19, 1897, upon due notice had to the owner of the above-described lots, Edward McGreevy, judgment was rendered condemning the same to be sold to pay said assessment, penalty, and costs, amounting to the sum of $7.46; that said judgment was regular, and in all things in accordance with the law in such cases made and provided; that on April 3, 1899, C. E. Brogan, the duly-authorized agent of Edward McGreevy for that purpose, by tender legally and properly made according to law, offered and tendered to A. E. Hardin the amount paid by him for the lots, together with 20 per centum thereon, which said Hardin refused to receive, whereupon said Brogan, on April 3, 1899, paid said amount and 20 per centum to the clerk of the court, who made the following entry on the margin of the decree aforesaid, to wit: "April 3, 1899. Redeemed. Redemption money deposited with the clerk. [Signed] D. P. Durden, Clerk, by H. A. Durden, D. C." The case is thus summed up in appellee's brief: "On March 26, 1898, Hardin paid state and county taxes on said lots for the year 1897. On April 9, 1898, Brogan, as agent of McGreevy, offered and tendered said Hardin the amount of said state and county taxes, which Hardin accepted, and the receipt which had been issued to Hardin was taken up, and a new receipt, dated April 9, 1898, issued. At the time of this payment of state and county taxes by Hardin, neither of the parties mentioned the sewer tax, nor the fact that said lots had been condemned and sold for said sewer taxes, and bought in by Hardin, and Brogan did not then know that said lots had been sold for sewer taxes, when as a matter of fact Hardin was then holding the certificate for the same. On March 3, 1899, Hardin again paid the state and county taxes for the year 1898 upon the property, and on April 3, 1899, Brogan offered to pay said taxes, and was informed again that they had been paid by Hardin, and at once went to see Hardin, and offered to pay the same, which Hardin refused to accept, and Brogan then learned for the first time that Hardin had bought the lots at sewer-tax sale,

and he immediately, to wit, on the 3d April, 1899, offered to redeem said land from the sewer-tax sale, and made tender of the amount due thereon, with penalties, also state and county taxes, to Hardin, which was refused, and then made said payment to the clerk, and caused said payment to be entered of record, as stated."

When Brogan, on the 9th April, 1898, tendered and paid Hardin the taxes, state and county, which the latter had paid on the 26th March, 1898, for the year 1897, if Hardin intended to claim title under his previous purchase at sewer-tax sale he should not have accepted the money from Brogan. To accept the state and county taxes from him, and yet not disclose his real claim, was, of course, misleading to Brogan, who was ignorant of the sewer-tax sale, and this itself was a circumstance going to show to Hardin the ignorance of Brogan on the subject; for no prudent man would seek to redeem land from one burden, while a still more fatal one to his interest was suffered to remain. Hardin's withholding this information from Brogan could have had but one object, and that to hold the secret lien until the time for redemption should expire, and his lien should ripen into a title. This theory is the more apparently correct when he refused the very same tender on April 3, 1899, when he thought the time for redemption from the sewer-tax sale had expired. The chancellor, in effect, found that Hardin knew of the ignorance of Brogan as to his purchase, and that Hardin acted upon that theory in the transaction, and held that he was thus estopped from claiming title under his purchase. We see no cause to disturb his findings. Affirmed.

HALSEY v. TOWN OF LAKE VIEW.

(*Supreme Court of Illinois, Dec. 20, 1900.*)

[59 N. E. Rep. 234.]

Local Improvements—Construction of Statute.—Where, under Acts 1897, authorizing local improvements and assessments therefor, section 97, authorizes the adoption of the act by any city, incorporated town, or village, and sections 1 and 98 make the act applicable to municipalities incorporated under the general incorporation law, the town of Lake View, having been incorporated under the general law, has authority to levy assessments for street improvements without adopting the act, as provided by section 97.

Pleading—Objection by Owner of Non-Abutting Property.—Where the record does not show that the property owned by one objecting to the confirmation of an assessment for street improvements is not contiguous property, and abutting on the street, an objection by such owner that such assessment includes all property benefited by the improvement, though not abutting on the street, will not be considered.

Street Improvement Ordinance—Double Assessment.—Where one ordinance authorized the paving of a street, and an assessment was made for the part of the work done under such ordinance, a subsequent

ordinance, directing the completion of the balance of the work, and levying an assessment therefor, is not invalid, as levying a double assessment for the same improvement.

Same—Same.—Where one ordinance for street improvements provided that lamp tops should be furnished by park commissioners, and no assessment was levied therefor, a subsequent ordinance, requiring lamp tops, and levying an assessment therefor, is not invalid, as being double assessment for the same improvement.

Same—Indefiniteness.—Where a street is 2 miles in length and intersected by many streets and alleys and railroad tracks, an ordinance providing for the requisite number of lamp posts, and that they be set about 300 feet apart, is not defective for indebtedness, since conditions might compel a variation from the exact distance.

Same—Assessment Payable in Installments—Interest—Judgment.—Where an ordinance provides that assessments for street improvements shall be made in five annual installments, an objector to such assessment cannot complain that the judgment confirming it provided for interest on the deferred installment from January 2, 1902, since the judgment conforms to the statute, and does not provide as much interest as might have been allowed.

Same—Material Must Equal Samples.—The provision, in an ordinance for street improvements, that samples of materials to be used must be furnished by contractors, and the materials furnished must be equal to the samples, is a precaution that the work shall be as contracted for, and hence does not permit a substitution of material so as to invalidate the assessment.

Same—Provision for Guaranty.—The requirement of a guaranty for five years of a cable system provided in an ordinance for street improvements, and that it shall stand a certain test at the end of such period, is designed to secure a good and durable equipment, and hence does not invalidate the assessment, as not being within the power of the municipality.

Appeal from superior court, Cook county; Alexander Chytraus, Judge.

Proceedings by the town of Lake View against Edward A. Halsey for confirmation of a special assessment for street improvements. From a judgment confirming the assessment, defendant appeals. Affirmed.

Ira J. Geer, for appellant.

James McCartney, for appellee.

CARTWRIGHT, J. The superior court of Cook county overruled appellant's objections to a special assessment levied upon his property to pay the costs of cables, lamp posts, arc lamps, etc., for lighting with electricity Diversey street as a boulevard and a part of Lincoln Park, in the city of Chicago, and entered a judgment confirming said assessment, from which he prosecuted this appeal.

Appellant first contends that the town of Lake View had no authority to levy the assessment under the act of 1897 concerning local improvements, for the reason it is not shown that said town ever passed an ordinance adopting said act. Section 97 of the act in question provides for such adoption by any city or incorporated town or village, but sections 1 and 98 make the law applicable to municipalities incorporated under the general incorporation law, or which had adopted article 9 of said law, or which had power to levy a special

assessment before said act of 1897 was passed, and authorize them to make use of the provisions of the act. The town of Lake View belongs to a class of municipalities to which the act of 1897 applies without adoption. Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688.

It is next claimed that the act enabling park commissioners to take public streets leading to public parks, and pay for the improvement thereof, authorizes the levy of a special tax or assessment only on contiguous property abutting upon such streets, and that the ordinance in this case is invalid because it provides for assessing all property benefited by the improvement. For aught that appears, the appellant's property is contiguous property abutting on the boulevard, and within the terms of the statute as he asks to have it construed. It would, of course, be no injury to him if other property not abutting should also be assessed, and contribute to the expenses of the improvement. The abstract does not show that he is entitled to raise the objection.

The ordinance, a copy of which was annexed to the petition, provides not only for the equipment for electric lighting, but also for surfacing the roadway with crushed granite, and putting in conduits and handholes, the items for which, as contained in the estimate, amount to $12,834.50. The petition alleged that the granite surfacing, conduits, and handholes had been otherwise provided for, and that said portion of the work was partially done, and it only prayed for an assessment for the necessary equipment for lighting with electricity. On hearing it was stipulated between counsel that there had been a previous ordinance providing for said granite surfacing, conduits, and handholes, and a special assessment made and contract let under which said work had been partially done. Appellant says that an ordinance cannot be subdivided, and a part of the work be arbitrarily omitted from the assessment, and an assessment levied to pay for only part of the improvement. No assessment could be levied for the work which had already been provided for, and which appellant's property had been assessed to pay. He could object to an assessment for such work, and we think that the municipality had a corresponding right to omit that part, and not ask an assessment on account of it. We do not see why he should complain that the ordinance provides for other work for which no assessment is asked.

Many objections are urged against the ordinance, but nearly all of them relate to that part of the ordinance for which no assessment is made. Of this character are the objections that the width of the roadway to be improved is not specified; that the meaning of the terms employed and the proportion of crushed granite and gravel are uncertain; that the distances at which handholes are to be built are uncertain; and that it is optional with the contractor to use different kinds of pipe in the conduits. Appellant is not asked to pay for any of those

things, and it is immaterial in this case whether the ordinance would support a special assessment to pay for them or not. This is also a sufficient answer to his claim that the ordinance is unreasonable and oppressive in providing a second time for the same improvement. The only thing he points out which was mentioned in the former ordinance is the lamp tops. This ordinance provides for cast-iron lamp posts with curved tops. The former ordinance provided that boulevard lamp tops would be furnished by the commissioners of Lincoln Park, to be placed on existing lamp posts in the avenues. There was no assessment for lamp tops under such former ordinance, and there is consequently no double assessment for the same improvement. The lamp tops, under the first ordinance, were to be furnished by the park commissioners, and not at the expense of the property owner.

The lamp posts are to be set at a distance of about 300 feet from each other, and it is insisted that the distance is not sufficiently specified. Counsel for appellant says that the street is about two miles long, intersected by many streets and alleys and railroad tracks. Such a situation would probably compel a variation in distances in different places in setting the lamp posts, and that was doubtless the cause of the provision. We take it to mean that the lamp posts shall be substantially 300 feet apart; and the estimate is for at least the requisite number. There are some minor objections to the estimate, but none of them are substantial.

The judgment provides for the collection of interest on the deferred installments only from January 2, 1902, while the ordinance provides that the assessment shall be payable in five equal annual installments, with interest. The court entered its judgment to conform with the statute, except that it did not allow as much interest as might have been allowed. The action of the court was in favor of the property owner, and the appellant cannot complain of it.

Another objection is that the ordinance provides the contractor shall furnish samples of the articles and materials to be used in doing the work, which shall be subject to approval of the superintendent of Lincoln Park, and the material furnished on the work must be equal, in all respects, to such samples. The objection is that a substitution of materials not provided for is thereby authorized. We do not so understand the provision, which is plainly for the protection of the property owner, and a mere precaution that the material used shall be such as is contracted for.

The ordinance provides for a guaranty of the cable system by the contractor for a period of five years, and that at the end of that time it will stand a certain test. Appellant urges that it is not within the power of the authorities to provide for a guaranty. The provision is designed to secure a good and durable equipment, and it does not vitiate the assessment. Graham v. City of Chicago (Ill. Sup.) 58 N. E. 393. The judgment is affirmed. Judgment affirmed.

FIDELITY TRUST & SAFETY-VAULT CO. *v.* VORIS' EX'RS.

(Court of Appeals of Kentucky, March 15, 1901.)

[61 S. W. Rep. 474.]

Street Assessments—Liability of Property Not Bordering on Street.—Under Ky. St. §§ 2833, 2834, part of charter of cities of the first class, providing that, in assessing property for the cost of the original construction of a street each subdivision of the territory bounded on all sides by principal streets is to be deemed a square, and that the cost is to be apportioned in each fourth of a square equally, but that, when the territory is not defined into squares by principal streets, the depth "on both sides fronting said improvement," to be assessed for the cost of making it, shall be defined by the ordinance, the council, in determining the depth to be assessed, has no power to cross another principal street, and lay the burden on property fronting on that street, deriving no benefit from the improvement.

Appeal from circuit court, Jefferson county, common pleas division.

"To be officially reported."

Action by the executors of S. B. Voris against the Fidelity Trust & Safety-Vault Company to enforce a lien for the cost of a street improvement. Judgment for plaintiffs, and defendant appeals. Reversed.

Hardin H. Herr, Gibson & Marshall, and Pirtle & Trabue, for appellant.

H. M. Lane, for appellees.

HOBSON, J. On February 14, 1894, the general council of the city of Louisville passed an ordinance fixing the grade of Third street from the south line of Brandeis street to the north line of K street extended, and ordering the improvement of the carriage way 42 feet in width from a line 106 feet south of Brandeis avenue to the north line of K street. The territory contiguous to the improvement was not defined into squares by principal streets, and the council, by ordinance, provided that the cost of the improvement should be laid upon the property lying on either side of the street to be improved, and within 200 feet of it. The improvement was made under the ordinance, and this suit was filed by the contractor to enforce his lien upon the property for his work. Third street runs substantially north and south. About 106 feet south of Brandeis avenue it forks. The west fork is known as "Old Third Street," or "Park Place," and has been a traveled way maintained by the city for many years. The east fork, known in the record as "New Third Street," is the street ordered to be constructed. Appellant's property, on which the burden of this improvement was placed by the ordinance, lies west of Old Third street, or Park Place; and between it and the improvement is the street in front of it, and also a lot of ground belonging to the Louisville Industrial School of Reform. It is insisted for appellants that the cost of the improvement cannot be assessed against their property, as they

do not front upon it, and that as the cost of maintaining the street in front of them, as well as part of the cost of maintaining Fourth street and Brandeis avenue, falls upon them, if they can also be assessed for the improvement to New Third street they may be assessed for three streets running substantially north and south.

Sections 2833, 2834, Ky. St., are as follows:

"When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square to be equally apportioned by the board of public works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue and not of the sidewalk. Each sub-division of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth as set out in the ordinance. * * *

"A lien shall exist for the costs of original improvement of public ways * * * for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the court in which suits may be pending, shall make all corrections, rules or orders to do justice to all parties concerned; and in no event if such improvement be made as provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof."

It will be observed that each subdivision of the territory bounded on all sides by principal streets is to be deemed a square, and that the cost of the improvement of a street by original construction is to be apportioned in each fourth of a square equally. When the territory is divided into squares, each fourth of a square is the basis of the apportionment. When the territory is not defined into squares by principal streets, the depth on both sides fronting the improvement to be assessed for the cost of making it is to be defined by the ordinance. The statute does not authorize any property to be assessed under this power, except that "on both sides fronting said improvement." The reason of this is that the apportionment for the improvement is to be made, as expressed in the last clause of section 2834, "against the property receiving

the benefit thereof." That part of the statute which makes each fourth of a square the unit, where the land is divided into squares, is clearly inconsistent with the idea that, in determining the depth on both sides which may be assessed for an improvement, the council may cross another principal street, and lay the burden on property fronting on that street, and deriving no benefit from the improvement. If the council may cross one street, it may cross two or more, and the property of the individual might thus be taken for public purposes without just compensation as provided in the constitution. We cannot presume the legislature intended any such result, and, the words of the statute not requiring such a construction, it cannot be adopted upon doubtful intendment. This court has often held that the basis of all assessments of this character is presumptive benefit received, and that an assessment which amounts to spoliation will not be enforced. Sutton's Heirs v. City of Louisville, 5 Dana, 28; Courtney v. Same, 12 Bush. 419.

Preston v. Roberts, 75 Ky. 570, Stengel v. Preston, 89 Ky. 623, 13 S. W. 839, and Boone v. Nevin (Ky.) 23 S. W. 512, are relied on to sustain the judgment. The reasoning of the first case supports the conclusion we have reached in this case. We fail to see in either of the other cases anything in conflict with it. The facts of those cases, under the statute there before the court, distinguished them from this case.

The city of Louisville is not a party to this appeal; neither is the Industrial School of Reform; and what their liability may be to the contractor, under the facts presented, we cannot therefore now determine. Judgment reversed, and cause remanded for a judgment pursuant to this opinion.

CITY OF AUGUSTA *v.* MCKIBBEN *et al.*

(Court of Appeals of Kentucky, Jan. 16, 1901.)

[60 S. W. Rep. 291.]

Improvement of Sidewalk—Validity of Ordinance.—Where a sidewalk was condemned, and a new one required to be laid, it was not necessary for the ordinance to prescribe the grade of the proposed sidewalk, as the grade, by necessary inference, was left as it was before.

Same—Advertisement for Bids.—Where the council ordered a pavement to be made within 40 days, and if not made within that time that the street committee should advertise for bids for the work for at least 10 days, the failure of the council to proceed at once upon the expiration of the 40 days did not deprive it of the right to do so thereafter.

Same—Same—Irregularity.—The failure of the committee to comply strictly with the direction to give 10 days' notice of the bidding did not invalidate the contract which the council made, as the whole matter of notice rested in its discretion, there being no statute requiring notice.

Same—Benefits—Apportionment of Assessment.*—The benefits to

*See Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. Ed. 443; French *v.* Barber Asphalt Pav. Co., and *note*, *ante*, p. 1.

City of Augusta *v.* McKibben

abutting property from the construction of a sidewalk will be presumed to be sufficient to authorize an apportionment at five cents a square foot, amounting to $38.70, nothing else appearing.

Appeal from circuit court, Bracken county.

"Not to be officially reported."

Action by the city of Augusta against S. W. McKibben and others to enforce a lien for the cost of a street improvement. Judgment for defendants, and plaintiff appeals. Reversed.

M. J. Hennessey, for appellant.

A. M. J. Cochran, for appellees.

HOBSON, J. The city of Augusta filed this action in the court below to enforce a lien on appellee's property for $38.70, the amount assessed against it in an apportionment of the cost of a sidewalk built on the street fronting it in that city. The court below sustained a general demurrer to the petition.

The statute governing cities of the fifth class, which includes Augusta, provides, among other things, as follows: "The city council is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways and public places of such city. The cost and expense incurred in constructing or repairing streets, avenues, highways, sewers and public places shall be paid out of the general fund of the city. The expense incurred in making and repairing sidewalks and curbing shall be paid by the owners of land fronting and abutting thereon, each lot or portion of a lot being separately assessed for the full value thereof in proportion to the frontage thereof to the entire length of the whole improvement, not exceeding a square, sufficient to cover the total expense of the work; but the owners of such property shall have the right to make such improvement if they preferred doing so instead of paying for same. Whenever any expense or cost of work shall have been assessed on any lands as herein provided, the amount of said expense shall become a lien upon said lands which shall take precedence of all other liens, and which may be enforced by the contractor or city in accordance with the provisions of the Code of Practice." Ky. St. § 3643.

On December 14, 1894, the city council adopted a general ordinance regulating the making of sidewalks. On May 12, 1899, after receiving reports from its street committee condemning the existing sidewalks, and recommending the making of a new one in the place of it in front of certain lots, including appellees', the council made an order directing the pavements to be made of brick within the next 40 days. Due notice of this order was given. On June 9, 1899, they ordered the street commissioner to report, among other things, the lots where the pavement had not been built as directed. On July 3d they extended the time 40 days for the property owners to build the pavements. On September 13th they again made an order that the pavement should be made within 40 days,

and. if not made within that time, for the street committee to advertise for bids for the work for at least 10 days. Appellees still refusing to obey the orders of the council, on November 29th advertisement was made to the effect that up to 6 p. m. on Friday, December 8, 1899, sealed bids would be received by the committee, and at a meeting of the council on that night it accepted the lowest bid made. The contractor gave bond and did the work at five cents a foot. The council apportioned the amount among the property owners, and, appellees still refusing to pay their apportionment of $38.70, this suit was filed.

It is contended for the appellees that the demurrer to the petition was properly sustained, because the ordinance does not prescribe the grade of the proposed sidewalk, and Hydes v. Joves, 4 Bush. 464, is relied on. In that case the city council authorized the city engineer to fix the grade of the street in the ordinance requiring the work to be done instead of fixing it themselves. The case before us is wholly different. The old sidewalk was condemned, and a new one was required to be laid. This is all the ordinance or contract provided for. The grade of the street was, by necessary inference, left as it was before. That which is necessarily implied need not be expressed, there being no statute regulating the subject.

It is also insisted that, because the council did not proceed at the end of the 40 days allowed by the ordinance of September 13th, it was erroneous for them to proceed afterwards. There was no statute regulating the subject. It was left to the discretion of the council how and when they should proceed in this matter, and, if they saw fit to wait and give appellees further time to reconsider and comply with the order, we are unable to see what ground of complaint the appellees, at least, can have. The contract was let on December 8th. The advertisement for the bids was made on November 29th, and, under the rulings of this court, both days cannot be counted, and so there was only 9 days' notice of the bidding given. If the statute had required 10 days' notice, to be given this would be a very serious objection to the proceeding, but there is no such provision in the statute. The only thing in the record is a direction by the council to its committee to advertise 10 days. The failure of the committee to comply strictly with this direction does not invalidate the contract which the council saw fit to make itself, for the whole matter of the notice to be given rested in its discretion.

It is also earnestly argued that under the decision in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, the apportionment sued on cannot be enforced. We are wholly at a loss to see anything in this case to bring it within the decision in that case, which must be read in connection with the previous decisions of the court, notably Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544, where, in an opinion by Chief Justice Fuller, the Ken-

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abutting property from the construction of a sidewalk will be presumed to be sufficient to authorize an apportionment at five cents a square foot, amounting to $38.70, nothing else appearing.

Appeal from circuit court, Bracken county.

"Not to be officially reported."

Action by the city of Augusta against S. W. McKibben and others to enforce a lien for the cost of a street improvement. Judgment for defendants, and plaintiff appeals. Reversed.

M. J. Hennessey, for appellant.

A. M. J. Cochran, for appellees.

HOBSON, J. The city of Augusta filed this action in the court below to enforce a lien on appellee's property for $38.70, the amount assessed against it in an apportionment of the cost of a sidewalk built on the street fronting it in that city. The court below sustained a general demurrer to the petition.

The statute governing cities of the fifth class, which includes Augusta, provides, among other things, as follows: "The city council is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways and public places of such city. The cost and expense incurred in constructing or repairing streets, avenues, highways, sewers and public places shall be paid out of the general fund of the city. The expense incurred in making and repairing sidewalks and curbing shall be paid by the owners of land fronting and abutting thereon, each lot or portion of a lot being separately assessed for the full value thereof in proportion to the frontage thereof to the entire length of the whole improvement, not exceeding a square, sufficient to cover the total expense of the work; but the owners of such property shall have the right to make such improvement if they preferred doing so instead of paying for same. Whenever any expense or cost of work shall have been assessed on any lands as herein provided, the amount of said expense shall become a lien upon said lands which shall take precedence of all other liens, and which may be enforced by the contractor or city in accordance with the provisions of the Code of Practice." Ky. St. § 3643.

On December 14, 1894, the city council adopted a general ordinance regulating the making of sidewalks. On May 12, 1899, after receiving reports from its street committee condemning the existing sidewalks, and recommending the making of a new one in the place of it in front of certain lots, including appellees', the council made an order directing the pavements to be made of brick within the next 40 days. Due notice of this order was given. On June 9, 1899, they ordered the street commissioner to report, among other things, the lots where the pavement had not been built as directed. On July 3d they extended the time 40 days for the property owners to build the pavements. On September 13th they again made an order that the pavement should be made within 40 days,

and, if not made within that time, for the street committee to advertise for bids for the work for at least 10 days. Appellees still refusing to obey the orders of the council, on November 29th advertisement was made to the effect that up to 6 p. m. on Friday, December 8, 1899, sealed bids would be received by the committee, and at a meeting of the council on that night it accepted the lowest bid made. The contractor gave bond and did the work at five cents a foot. The council apportioned the amount among the property owners, and, appellees still refusing to pay their apportionment of $38.70, this suit was filed.

It is contended for the appellees that the demurrer to the petition was properly sustained, because the ordinance does not prescribe the grade of the proposed sidewalk, and Hydes v. Joyes, 4 Bush. 464, is relied on. In that case the city council authorized the city engineer to fix the grade of the street in the ordinance requiring the work to be done instead of fixing it themselves. The case before us is wholly different. The old sidewalk was condemned, and a new one was required to be laid. This is all the ordinance or contract provided for. The grade of the street was, by necessary inference, left as it was before. That which is necessarily implied need not be expressed, there being no statute regulating the subject.

It is also insisted that, because the council did not proceed at the end of the 40 days allowed by the ordinance of September 13th, it was erroneous for them to proceed afterwards. There was no statute regulating the subject. It was left to the discretion of the council how and when they should proceed in this matter, and, if they saw fit to wait and give appellees further time to reconsider and comply with the order, we are unable to see what ground of complaint the appellees, at least, can have. The contract was let on December 8th. The advertisement for the bids was made on November 29th, and, under the rulings of this court, both days cannot be counted, and so there was only 9 days' notice of the bidding given. If the statute had required 10 days' notice, to be given this would be a very serious objection to the proceeding, but there is no such provision in the statute. The only thing in the record is a direction by the council to its committee to advertise 10 days. The failure of the committee to comply strictly with this direction does not invalidate the contract which the council saw fit to make itself, for the whole matter of the notice to be given rested in its discretion.

It is also earnestly argued that under the decision in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, the apportionment sued on cannot be enforced. We are wholly at a loss to see anything in this case to bring it within the decision in that case, which must be read in connection with the previous decisions of the court, notably Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544, where, in an opinion by Chief Justice Fuller, the Ken-

tucky statute is expressly sustained. Cities cannot exist without sidewalks. By common consent, so far as we have seen, sidewalks are universally constructed at the cost of the adjoining property owner; and if an apportionment for a sidewalk at five cents a square foot, amounting to $38.70, cannot be enforced, nothing else appearing, the universally admitted doctrine of legislative discretion as to the mode of apportioning burdens of this description, and of presumptive benefits, however apparent, must be abandoned.

Judgment reversed, and cause remanded, with directions to the court below to overrule the demurrer to the petition, and for further proceedings not inconsistent with this opinion.

CITY OF LOUISVILLE *v.* GOSNELL *et al.*

(Court of Appeals of Kentucky, March 20, 1901.)

[61 S. W. Rep. 476.]

Appropriation for Street Repairs—Part of Contract Price to Cover Future Repairs.—Under Ky. St. § 2820, providing that the executive boards of cities of the first class and their officers shall not have power to bind the city to any extent beyond the amount of money at the time "already appropriated" by ordinance for the purpose of the department under the control of said board, where a part of the contract price of the original construction of a street was intended to cover future repairs the contractor was entitled to recover of the city that part of the price to be paid out of the appropriation for street repairs, no more specific appropriation being necessary.

Contract Creating Debt in Excess of Income*—Pleading.—To invalidate a contract by a city on the ground that it creates an indebtedness in excess of the income and revenue provided for the year, in violation of Const. § 157, the facts showing that such is the effect of the contract must be alleged.

"Not to be officially reported."

Petition for modification of opinion. Granted.

For former report, see 60 S. W. 411.

DU RELLE, J. On a former appeal of this case, under the style of Fehler v. Gosnell, 99 Ky. 394, 35 S. W. 1125, the city of Louisville was not a party. After the return of the case the city was made a party, and judgment sought against it for 10 per cent. of the amount of the apportionment warrants sued on, as not being for original construction of streets, but for repairs. Upon a second appeal of the case, under the style of Gosnell v. City of Louisville, 46 S. W. 722, it was held that a cause of action was stated against the city upon that claim. After the second appeal, the city filed its answer, to which a demurrer was sustained, and the correctness of that decision is now before us.

In the opinion upon the second appeal we held "that the city has authority to contract with regard to street repairs, and,

*See *note* on "Municipal Indebtedness," 5 Mun. Corp. Cas. 725.

having so contracted, we cannot assume that it has done so to such an extent as to increase the tax rate beyond the limit provided in section 157 of the constitution, or beyond the appropriation and levy provided for and mentioned in the sections of the act for the government of cities of the first class above referred to. On the contrary, we must assume that, in acting upon a subject with respect to which it had jurisdiction to act, it acted within the constitutional limitation, and within its revenue as fixed and limited by the statute quoted. We see no reason why the city, if not exceeding the amount of its revenue which it is authorized to expend, may not expend its money for objects the benefit of which it will receive in subsequent years."

Upon the return of the case after the second appeal, counsel for the city, in a series of very skillfully drawn paragraphs, has attempted to plead around the opinion of the court. The first paragraph relies upon section 2820, Ky. St., providing that the executive boards and their officers shall not have power to bind the city "to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the department under the control of said board," and it is claimed that, as no specific amount had been appropriated by ordinance for the specific purpose of paying 10 per cent. of the contract price of the street improvements under consideration for five years' repairs of the improvement after its completion, this claim could not be paid at all, although the same answer shows that over $95,000 had been appropriated for the payment of street repairs for that year. As we have held these repairs are to be treated as ordinary street repairs, the averments of the paragraph do not constitute a defense, under section 2820.

So, in the third paragraph, appellant seems to be proceeding upon the theory that the subdivision of the levy was an appropriation for street repairs, and, therefore, having been appropriated for that purpose by the levy ordinance, there was no unexpended or unappropriated balance thereof which could, without violation of section 2982, be expended in payment for the street repairs here in question. The fourth paragraph is practically a plea that the court was in error in what it said upon the subject of these repairs in the former opinion. To be available, this matter should have been presented by petition for rehearing.

The second paragraph, which undertakes to rely upon section 157, of the constitution, is, if we understand it correctly, a statement that the amount of the contract price under consideration, which has been held to be for repairs, viz. $577.07, makes the amount of indebtedness of the city for repairs of streets for that year exceed the total revenue and income of the city for that year by the amount of $577.07. We hardly think counsel intended to make such a statement. But we

are not of opinion that facts to show that this contract was in violation of section 157 of the constitution have been sufficiently pleaded in this paragraph. The judgment is therefore affirmed.

BERNARD *v.* GREEN *et al.*

(*Court of Appeals of Kentucky, Feb. 7, 1901.*)

[60 S. W. Rep. 631.]

Street Assessments—Pleading.—In an action to enforce a lien for the cost of a street improvement, a demurrer to the petition does not lie on the ground that a certain part of the apportionment warrant sued on was for keeping the street in repair, where neither the petition nor the ordinance or contract shows that anything was included for repairs.

Appeal from circuit court, chancery division, Jefferson county.

"Not to be officially reported."

Action by James Green and another against S. M. Bernard to enfore a lien for the cost of a street improvement. Judgment for plaintiffs, and defendant appeals. Affirmed.

John Roberts and D. M. Rodman, for appellant.

BURNAM, J. Appellant complains of a judgment giving a lien upon his property for the whole amount of an apportionment warrant which was issued to E. L. Colson, contractor, for his proportion of the cost of improving Oak street from the central line of Fourteenth street, and Fourteenth street, if extended to the central line of Fifteenth street, by original construction of the carriage way of Oak street 36 feet in width, and by grading, curbing, and paving with vitrified brick, on the ground that there is included and charged in this apportionment warrant the 10 per cent. for keeping the street in repair. This question was attempted to be raised by demurrer alone, and, to support his contention, appellant refers us to the case of Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125. In that case the ordinances for the improvement of the carriage way of Oak street were filed with and made a part of the petition, and showed that the contractor guarantied the faithful performance of his contract according to the ordinance, and that the pavement therein specified, and the material composing same, should be kept in good repair for a period of five years from the completion of the work, and its acceptance by the board of public works. In this case neither the ordinance, contract, nor petition shows such an undertaking on the part of the contractor, so far as we are able to discover. We therefore conclude that appellant's demurrer was properly overruled, and that the petition sets up a good cause of action against the owner of the property sought to be subjected. No other error is complained of, and the judgment must therefore be affirmed.

JOHN *v.* CONNELL *et al.*

(*Supreme Court of Nebraska, Feb. 6, 1901.*)

[85 N. W. Rep. 82.]

Grading Street—Special Assessment—Ascertaining Damage before Ordering Levy.—The provision of section 117 of the Omaha charter (chapter 10, Sess. Laws 1887) with respect to the ascertainment of damages before ordering the grading of a street is mandatory and indispensable, and compliance with the requirement is essential to vest the mayor and council with jurisdiction to levy a grading tax.

Tax Sale—Irregularity—Subrogation of Purchaser to Tax Lien.—Whether a tax sale is void on account of irregularities, or is void for want of authority in the treasurer to sell, the lien of the tax for the nonpayment of which the sale was made is transferred from the public to the purchaser.

Subrogation of Purchaser to Lien for Prior and Subsequent Taxes.—And in such case the lien for any prior or subsequent taxes afterwards paid by the purchaser for the protection of his rights under the tax-sale certificate is likewise transferred to him.

Tax Sale—Certificate Based upon Void Assessment.—A tax-sale certificate based upon a void levy or assessment gives to the person to whom it is issued no lien upon the property described therein.

Same—Payment of Subsequent Taxes by Purchaser.—But if the owner of such certificate, in the belief that it is valid, pays taxes subsequently levied, and which are a lien upon the property described in the certificate, he is subrogated to the rights of the public in such taxes, and entitled to enforce the lien therefor.

Special Assessments — Jurisdictional Prerequisites — Reversal of Judgment.—Where the record shows substantial compliance with the jurisdictional prerequisites by the taxing authorities in levying a special assessment, and the landowner fails to point out or suggest the existence of any substantial defect in the proceedings, the judgment of the district court refusing to enforce the lien created by the statute in favor of the public will be reversed.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Powell, Judge.

Action by David C. John against William J. Connell and others. From the judgment John appeals, and Connell and others take cross appeals. Reversed.

Wm. D. Beckett and H. P. Leavitt, for appellant.

Connell & Ives, for appellees.

SULLIVAN, J. This action to foreclose a tax lien was brought by David C. John against William J. Connell in the district court of Douglas county. It is claimed that the lien results from a tax sale based upon a special assessment made by the proper authorities of the city of Omaha to defray the cost and expense of grading Poppleton avenue between Twentieth and Thirty-Sixth streets. It is alleged in the petition and shown by the proof that in 1892 the defendant's lot was, by the county treasurer, sold for the satisfaction of a delinquent grading assessment; that the plaintiff was the purchaser; that he received a tax-sale certificate in the usual form; and that he afterwards paid other general and special taxes charged against the property. The court found that the

special assessments were void, but that the general taxes were valid. It also found that the plaintiff was the owner by subrogation of the lien for general taxes, and rendered a decree enforcing the same. Both parties appeal. The defendant insists that the tax sale was not grounded upon a valid tax, and that therefore the plaintiff acquired neither a lien upon the property, nor the right to pay taxes levied against it for subsequent years.

At the time Poppleton avenue was ordered graded by the city authorities, the charter of 1887 had been adopted and was in force. By section 117 (chapter 10, Sess. Laws 1887) it was provided: "Before any street, avenue, or alley shall be ordered graded, the damages, if any, by reason of such grading to property along that portion of the street proposed to be graded, including approaches thereto, shall first be ascertained and determined by three disinterested free-holders, who shall be apppointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and who shall exclude any damages resulting from any change or changes of the original or first established grade, and the amount of damages so assessed, unless an appeal is taken, shall be due and payable to such property owners, or their agents, in sixty days after the completion and acceptance of such work of grading." The requirement of this section in regard to the ascertainment of damages was, in our opinion, mandatory and indispensable. It was a condition precedent to the exercise of the power to order the grading to be done. Our former decisions compel us to this conclusion. Smith v. City of Omaha, 40 Neb. 383, 69 N. W. 402; Ives v. Irey, 51 Neb. 136, 70 N. W. 961; Merrill v. Shields, 57 Neb. 78, 77 N. W. 368; Henderson v. City of South Omaha, 60 Neb. —, 82 N. W. 315; Von Steen v. City of Beatrice, 36 Neb. 421, 54 N. W. 677; State v. Birkhauser, 37 Neb. 521, 56 N. W. 303; Harmon v. City of Omaha, 53 Neb. 164, 73 N. W. 671; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524. There was no attempt on the part of the city authorities to comply with section 117, supra, and consequently they never acquired jurisdiction to levy the grading tax. Not only was the sale to plaintiff unwarranted and null, but the levy itself was without lawful authority, and created no lien against defendant's property.

Having concluded that the tax sale was not grounded on a valid assessment, we have next to inquire whether the court erred in giving judgment in favor of John for the general taxes, which he paid on the assumption that he had obtained a lien by virtue of the treasurer's certificate. It is now thoroughly settled by the decisions of this court that, so far as the purchaser is concerned, there is no substantial distinction between tax sales that are void on account of irregularities and those that are void for want of authority in the treasurer to sell. In either case the lien of the tax, for the

nonpayment of which the sale was made, is transferred from the public to the purchaser; and so, also, is the lien of any prior or subsequent tax afterwards paid by the purchaser for the protection of his rights under the treasurer's certificate. Grant v. Bartholomew, 57 Neb. 673, 78 N. W. 314; Adams v. Osgood, 60 Neb. —, 84 N. W. 257. The defendant, however, contends that the right to pay subsequent taxes does not exist in favor of a person who has only an apparent, and not an actual, lien upon the property. It is said that in such case there can be no subrogation, because that right does not belong to one who makes a payment voluntarily, and not for the protection of some right or interest which he has in the property. Such is the rule laid down in Sheld. Subr. § 240, and it is not questioned here; but it has been held in this state that the holder of a tax-sale certificate is not a volunteer, even though the land described in the certificate is exempt from taxation. Wilson v. Butler Co., 26 Neb. 676, 42 N. W. 891, 4 L. R. A. 589. In the case just cited Maxwell, J., speaking for the court, said: "A party having a lien on real estate, or having reason to believe that he has such lien, by paying taxes to protect the same cannot be said to have made such payments voluntarily, so as to preclude a recovery." And further along in the same opinion the learned justice observes: "The tax purchaser has a right to assume that the records of the county state the facts as they actually exist, and rely upon them, and is not compelled to look elsewhere for evidence of their veracity." In Merriam v. Hemple, 17 Neb. 345, 22 N. W. 775, the tax for the satisfaction of which the defendant's property was sold was void because, according to the decisions under the former revenue law, the failure of the assessor to swear to the assessment roll was a jurisdictional defect. Morrill v. Taylor, 6 Neb. 236; Lyman v. Anderson, 9 Neb. 367, 2 N. W. 732; McNish v. Perrine, 14 Neb. 582, 16 N. W. 837. But it was held, nevertheless, that the plaintiff had, by the payment of subsequent taxes, become subrogated to the rights of the public, and was entitled to enforce the lien acquired thereby. The doctrine of the case is thus stated in the syllabus: "Where the purchaser at a void sale of real estate for taxes pays the taxes legally levied upon the real estate for subsequent years, upon a failure of his title he will be subrogated to the rights of the county to the extent of the legal taxes so paid by him, with legal interest, even though the taxes upon which the sale was had were void by reason of the default of the assessor in not filing the proper oath with the assessment roll." It has been said over and over again in the decisions of this court that the policy of our revenue law has always been to encourage men to become purchasers at tax sales, by insuring them against loss of the money invested. The most recent expression upon the subject is found in Grant v. Bartholomew, supra. In that case Ragan, C., speaking of the legislation in favor of purchasers

at tax sales, said: "Now, what was the object of this legislation? It was designed as an incentive and an inducement to persons to purchase real estate offered for sale by county treasurers for the nonpayment of delinquent taxes thereon, so that the state might collect its revenues and discharge its obligations; and the legislature, having in mind the abhorrence of the courts for all forfeitures, and the disposition upon their part to put a strict construction upon revenue laws which deprived the citizen of his property for a tax much less than its value, provided that in no event should a purchaser at a tax sale whose title failed lose his money. If one purchased at a tax sale real estate on which no tax was due at the time, then the county was to hold the purchaser harmless by reimbursing him the money he had paid out at such tax sale; and if the land was liable for taxation, if taxes were due and delinquent against the land, then the owner of a tax-sale certificate was declared to be the assignee and the owner of the liens which the public had against that land, and for which the public had sold or attempted to sell it." The doctrine of subrogation has its foundation in the principles of a natural equity, and it is quite probable that the legislature contemplated, as a matter of justice as well as of policy, that, when the public received payment of any taxes from a tax-sale purchaser, the right of the public—its lien for taxes—should be transferred to and vest in such purchaser. The holder of a tax-sale certificate pays subsequent taxes with the understanding that he will be subrogated to the rights of the public; and the county treasurer, the agent of the public, receives payment with a like understanding of the effect of the transaction. This being so, it would seem that the statute (section 116, art. 1, c. 77, Comp. St. 1899) should be given a liberal construction, with the view of making the intention of the parties effective. To permit the extinguishment of a tax lien when the tax is paid by the holder of the treasurer's certificate would tend to frustrate the policy of the state with respect to the collection of its revenues, and would benefit no one except the delinquent landowner, whose attempt to escape the burdens of government renders him undeserving of its solicitude.

Our examination of the record has not revealed any vital infirmity in the proceedings which resulted in the levy of the sewer tax, and defendant has not pointed out or even suggested the existence of any substantial defect in such proceeding. We conclude, therefore, that the special sewer tax is valid, and that the court erred in not enforcing it. The judgment is reversed, and the cause remanded, with directions to the district court to render a decree enforcing the lien for general taxes and for the special sewer tax. Judgment accordingly.

MICHIGAN LAKE SUPERIOR POWER CO. *v.* ATWOOD, City Treasurer.

(*Supreme Court of Michigan, May 21, 1901.*)

[86 N. W. Rep. 139.]

Taxation—Return of Assessment Rolls—Unpaid Assessments—Failure of City Treasurer to Make Oath.—Under Sault Ste. Marie City Charter, c. 21, § 9 (Loc. Acts 1889, p. 545), providing that the treasurer of the city of Sault Ste. Marie, on the 1st day of November in each year, shall return to the comptroller all assessment rolls the time of returning which has expired, with a statement on oath of the parcels on which the assessments have not been paid, the failure of the treasurer to make oath to the list so returned is an irregularity, of which advantage cannot be taken in an action of replevin to recover property taken under a warrant to collect an assessment.

Same—Assessment by Comptroller—Taxes Declared a Debt—General and Special Assessments.—Sault Ste. Marie City Charter, c. 24, § 13 (Loc. Acts 1889, p. 553), provides that the comptroller of the city of Sault Ste. Marie shall assess the tax apportioned to the city according to the valuation in the assessment roll, and assess and levy in the same roll, in a separate column headed "Special Assessments," on the land, property, and persons chargeable therewith, all special assessments returned as delinquent; that the total of all taxes assessed against any one valuation or piece of property shall be footed up, and carried out in the last column of the roll; and that all taxes there assessed shall become at once a debt to the city from the person to whom they are assessed. Loc. Laws 1891, p. 932, § 14, authorizes a levy by distress and sale of the tax assessed under a warrant which commands the treasurer to collect the several sums mentioned in the last column of the roll. *Held*, that there is no distinction between the right of the treasurer to levy for special assessments and for other taxes.

Same—Collection—Distress—Abutter Acquiring Title Subsequent to Assessment.—Under Sault Ste. Marie City Charter, c. 24, § 13 (Loc. Acts 1889, p. 553), providing that all taxes when extended on the roll shall become at once a debt to the city of Sault Ste. Marie from the person to whom they are assessed, and Loc. Laws 1891, p. 932, § 14, providing that such taxes may be collected on a levy by distress and sale under a warrant to the treasurer, the treasurer may collect an assessment for a sewer in front of certain lots by levy on the personal property of the present owner of such lots in whose name the assessment is made, though such owner acquired title to the lots after the sewer was constructed.

Case made from circuit court, Chippewa county; Joseph H. Steere, Judge.

Action by the Michigan Lake Superior Power Company against Frank B. Atwood, city treasurer of the city of Sault Ste. Marie. From a judgment for plaintiff, defendant brings error. Reversed.

John W. Shine, for appellant.

Oren & Webster (George A. Cady, of counsel), for appellee.

HOOKER, J. The plaintiff is a corporation organized for the purpose of constructing an hydraulic canal in the city of Sault Ste. Marie, and the defendant is the treasurer of said city. The action is replevin for two locomotives seized by the defendant under his tax warrant attached to the general tax roll of the city for the year 1899, and the plaintiff claimed

upon the trial, and the circuit judge found, that the warrant conferred no authority to seize property for the assessment in question. The defendant has brought error.

In the year 1896 a special assessment roll was made, to cover the cost of a sewer constructed in 1895, and included various parcels of land owned by different persons, none of which were then owned by the plaintiff, or by Mr. Douglass, who afterwards took title to some of them in trust for plaintiff. The greater part of the sum assessed was not paid, and in September, 1897, the common council determined that the roll was invalid for certain reasons, and a new roll was ordered. This was made in 1898, and it was approved by the board of review in December of that year, and placed in the hands of the treasurer for collection. In November, 1899, the roll was returned to the city comptroller, who spread the uncollected sewer tax taken from this special roll upon the general tax roll of the city for the year 1899, acting under section 9 of chapter 21 of the charter (Loc. Acts 1889, p. 545), hereinafter quoted. The sworn statement required by section 9 was not filed with the comptroller. The plaintiff came into existence as a corporation in 1898. Douglass was its promoter and president, and took title to the land in question in trust for the company, subsequent to the making of the first special assessment roll; but whether before or after its organization does not clearly appear, but all the parcels were formally conveyed by him to the plaintiff on May 29, 1899, upon a nominal consideration. The finding shows that of the 17 parcels of land only one was assessed to the plaintiff on the special roll of 1898, though others were assessed to Douglass, its trustee. The plaintiff paid the other taxes, but did not pay these assessments. The failure of the treasurer to make oath to the statement of unpaid taxes was an irregularity, which is not available in an action of replevin, because the statute forbids that remedy when property is seized for the collection of a tax in obedience to the command of a valid tax warrant. See Lumber Co. v. Scott, 82 N. W. 76, and cases cited. Plaintiff asserts broadly that this portion of the tax appearing upon the general assessment roll cannot be lawfully collected by the distraint and sale of its personal property, and that, unless voluntarily paid, the only method of collection permitted by law is by a return of the same as delinquent, and sale of the lands. This must depend upon the provision of the charter. It is undeniable that the charter confers the power of distraining the property of the owner of lands to pay a special assessment upon said lands appearing upon a special assessment roll against him, and this does not depend upon his having been the owner at the time the improvement was determined upon or made. If it did, the collector would have no means of knowing whether or not the ownership had changed. He would be justified by his

warrant in distraining the property of the person charged with the tax upon his roll. This is also true in case of a reassessment, or when the uncollected assessment is carried upon the general roll. The warrant authorizes the collector to collect the tax, as mentioned in the last column of the general roll, by distress against the property of the apparent owner of the property taxed, as shown by the roll, and unless the law (which he must be presumed to know and understand) applies only to the current tax, and not to items of special assessment brought to and put upon the general roll from an uncollected special roll, he may distrain for both. Counsel seem to recognize this, and plant their case upon the claim that the charter should be construed as limiting the right to distrain personal property to the period of 60 days under the warrant attached to the special roll, and that the warrant upon the general tax roll gives no such authority as to the special assessments appearing there in a separate column as prescribed by law. Section 9 of chapter 21 and section 13 of chapter 24 of the charter must determine this question. They are as follows:

"Sec. 9. On the first Monday of November in each year the treasurer shall return to the comptroller any and all special assessment rolls remaining in his hands, the time of returning for which shall have expired, together with a statement on oath of the parcel or parcels upon which the amounts assessed have not been paid."

"Sec. 13. Upon the equalizing of the said assessment roll by the board of supervisors of Chippewa county the comptroller shall proceed to assess the tax apportioned to the said city according to and in proportion to the valuation entered by the board of review in the assessment roll of the city for the year. * * * He shall further assess and levy in the same roll in a separate column or columns headed 'Special Assessments' upon the land, property and persons chargeable therewith all special assessments returned as delinquent by the city treasurer and remaining unpaid. * * * The total of all tax assessed against any one valuation or parcel of property shall be footed up and carried out in the last column on the right-hand side of such roll. All taxes there assessed shall become at once a debt to the city from the person to whom they are assessed."

The latter section explicitly requires the inclusion of the special assessment in the footing contained in the last column on the right-hand side of the roll, and clearly makes all a debt to the city from the person assessed. Loc. Laws 1891, p. 932, § 14, authorizes a levy by distress and sale of the tax assessed under the warrant, which commands the treasurer to collect the several sums mentioned in the last column of the roll. We have, then, a case where the treasurer, in obedience to his warrant, has seized property for the collection of the amount remaining due of the aggregate of taxes as shown by

the last column of his roll. This the law explicitly authorizes, as we have seen, and it as explicitly requires the contested items to be included in the aggregate contained in the last column. The judgment is reversed, and a new trial ordered.

The other justices concurred.

MAXWELL *v.* AUDITOR GENERAL *et al.*

(*Supreme Court of Michigan, Jan. 29, 1901.*)

[84 N. W. Rep. 1112.]

Public Improvements—Assessments—Bill of Review—Setting Aside Decree.—A decree setting aside certain taxes and assessments for local improvements in a city was properly set aside on bill of review filed by the city, where it was not made a party to the original suit.

Appeal from circuit court, Bay county, in chancery; Byron A. Snow, Judge.

Bill by the city of Bay City to review a decree which had been entered in plaintiff's favor in an action by Edna Maxwell against the auditor general and another. From a decree setting aside the judgment and dismissing the original petition, said Maxwell appeals. Reversed.

A. C. Maxwell, for appellant.

Horace M. Oren, Atty. Gen., for appellee auditor general.

Brakie J. Orr, for appellee county treasurer.

LONG, J. This proceeding is by petition in the above case for leave to file a bill in the nature of a bill of review against the complainant, Edna Maxwell, for the purpose of having a certain decree entered in said cause revised, reversed, and set aside; that the city of Bay City may be made a party defendant in the cause; that the cause may be reheard, and the city of Bay City given an opportunity to make a defense against the allegations contained in the original bill of complaint. The original bill was filed, as alleged in the petition, to set aside certain assessments upon property described in the bill for certain local improvements in Bay City, to wit, paving taxes for the year 1883, taxes for 1885 (being taxes for 1883 reassessed), paving taxes for the year 1894, 1895, 1896, and a sewer tax of 1898. The petition shows that, when the original bill was filed, subpœna was served upon defendant Smith in September, 1899; that the appearance of both defendants was entered by the then prosecuting attorney of Bay county; that the stipulations signed by the then prosecuting attorney, dated in December, 1899, admitted notice of hearing of the cause for the September term of 1899. This stipulation was filed in the cause in June, 1900. The petition states that the cause came on to be heard before Judge Snow of the Tenth judicial circuit; that no witnesses were examined, no testimony given or received to sustain the allegations con-

tained in the bill; but that a decree was entered in the cause setting aside all such taxes, and directing the auditor general and county treasurer to cancel all such taxes on the books of their respective offices. It is further alleged in the petition that the city of Bay City is the real party in interest, and should have been made a party defendant, but that such city was not made a party, and had no notice or information of the pendency of the cause, and no opportunity to be heard or make any defense until after the decree was entered therein. It is claimed that the bill should be reviewed, and the decree reversed and set aside, for the following reasons: (1) That the solicitor for the complainant was the circuit judge of said county, and discharged the duties of such circuit judge during the time he was acting as solicitor for complainant in the cause; (2) that the solicitor for complainant was the husband of complainant, and did not address the bill of complaint to any justice of the supreme court, but as such solicitor for said complainant addressed the bill to himself as circuit judge; (4) that the said city of Bay City was the real party in interest, and a necessary party to said suit, and was not joined as a party thereto; (5) that the decree was made and granted by the court at a hearing of which the city of Bay City had no notice; (6) that the decree in said cause was made and signed contrary to the provisions of standing rule 14 of said court, none of the evidence in said cause taken in open court having been reduced to writing or typewriting, and filed, as required by rule 14, at any time previous to the time of signing or filing said decree; (8) that no testimony was offered in said cause warranting the court in setting aside the taxes referred to in said decree; (9) that no notice was had upon the auditor general in said cause. An affidavit was filed with this petition, sworn to by Brakie J. Orr, who is the present city attorney for the city of Bay City, in which he states on information and belief that the taxes so set aside are valid, and were legally assessed. The affidavit also states that no notice was given to the city of Bay City before decree taken in the original suit; that in the afternoon of December 30, 1899, he was called up by telephone, and informed that such suit was to be heard in court, but that such notice was so short it left him no time to examine and make preparation in the case. It also states that the city of Bay City has a good and meritorious defense to the suit, which it wishes to interpose. Upon the hearing of the petition in the court below, Judge Snow again sat in the case, and, after hearing it, entered a decree setting aside the original decree, and also dismissed the complainant's original bill, with costs. Complainant has appealed.

We think the court was not in error in setting aside the original decree, as the city should have been made a party defendant in the suit. It certainly was interested in being heard upon the question of the legality of the local assessment of taxes which were set aside, and therefore a necessary party.

It was not made a party, and never has had an opportunity to be heard. We need not discuss the other claimed reasons for setting aside the decree. We think, however, the court was in error in dismissing complainant's bill. The decree below will be reversed, and the case remanded. The defendants will have 30 days in which to answer the bill. Complainant will recover costs of this court. The other justices concurred.

HALL *v.* STREET COMMISSIONERS OF BOSTON.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 4, 1901.)

[59 N. E. Rep. 68.]

Sewer Tax—New Sewer and Old.—Act 1899, c. 450, § 3, provides that the board of street commissioners, at any time within two years after any "new sewer" is completed, shall assess on the several estates especially benefited a proportional part of the cost thereof. A sewer was completed in April, 1898, in a street where there was an old sewer on the opposite side, which was broken down and useless, and which was in no way connected with the new sewer. *Held*, that the sewer constructed constituted a new sewer, within the meaning of the statute.

Same—Amendment of Void Ordinance—Constitutional Law.—Act 1899, c. 450, § 3, provides "that the board of street commissioners, at any time within two years after any new sewer is completed, shall assess on the several estates especially benefited a proportional part of the cost thereof," and was enacted as an amendment to Act 1897, c. 426, § 7, which had been declared unconstitutional. A sewer was ordered constructed in August, 1897, and was completed in April, 1898. *Held*, that the sewer was within the meaning of the act, as it was passed to enable the city to collect for sewers for which it had failed to collect under the act of 1897, and must include all sewers built subsequent to the act of 1897.

Same—Limitation—Constitutional Law.—Act 1899, c. 450, § 3, providing that the board of street commissioners, at any time within two years after any new sewer is completed, shall assess on the several estates especially benefited a proportional part of the cost, is not unconstitutional, in that it does not apply to sewers built prior to a certain date, since such a limit of liability is no more unreasonable or contrary to principle than a statute of limitations.

Same—Sewers Already Constructed—Constitutional Law.—Act 1899, c. 450, § 3, providing that the board of street commissioners, at any time within two years after any new sewer is completed, shall assess on the several estates especially benefited a proportional part of the cost, is not unconstitutional, in that it provides for the levy of special assessments for sewers already built, since the benefit and payment are both compulsory, and not a matter of contract, and an improvement already executed will sustain a tax as well as an improvement completed with express notice under the law.

Same—Amendment of Void Ordinance—Constitutional Law.—Act 1899, c. 450, § 3, provides "that the board of street commissioners, at any time within two years after any new sewer is built, shall assess the property especially benefited with a proportional part of the cost," and was enacted as an amendment to Act 1897, c. 426, § 7, which had been declared unconstitutional. *Held*, that the contention that the act of 1899 was unconstitutional as an attempt on the part of the legislature to exercise judicial functions, and to revise the decision holding the act of 1897 unconstitutional, was without merit, since it was merely an attempt by the legislature to grant a valid authority where it had formerly given a void one.

Hall *v.* Street Commissioners of Boston

Petition by one Hall for a writ of certiorari to review the action of the street commissioners of Boston in levying an assessment for a sewer. Petition dismissed.

Walter N. Buffum, for petitioner.
Thomas M. Babson, for defendants.

HOLMES, C. J. This is a petition for a writ of certiorari to quash a sewer assessment laid under St. 1899, c. 450, § 3, which took the place of St. 1897, c. 426, § 7, declared unconstitutional in Sears v. Commissioners, 173 Mass. 350, 53 N. E. 876.

The act of 1899, in the first part of section 3, enacts that the board of street commissioners, "at any time within two years after any new sewer or drain * * * is completed, shall assess upon the several estates especially benefited by such sewer or drain a proportional part of the cost thereof, not exceeding in amount the sum of four dollars per linear foot," and goes on to provide for a reassessment of any such assessment which shall have been found to be invalid and is unpaid, or which shall have been recovered back. This act took effect June 1, 1899. The sewer in question was built under an order of August 5, 1897, the work being finished on April 5, 1898. There was an old sewer in the street, but it was on the other side, no part of it was used in the new construction, and it fairly is to be taken from the respondents' answer that they found it broken down and useless.

It is objected to the assessment that the sewer was not a new sewer, that the act does not apply to a sewer already built, and that if it does it is unconstitutional for that and other reasons. It is objected, further, that the answer does not show that the petitioner has not paid for the sewer within a proviso further on in the section; but this and some other objections go on the footing that the action of the board in this case is to be referred to a later power to "assess upon any estate heretofore or hereafter connected with a public sewer a reasonable part of the cost of construction thereof," subject to the proviso just referred to. As we are of opinion that the board acted under the words first quoted from the beginning of the section, and not under this later power, we shall say no more about these other objections, beyond adding that, so far as they go on a failure of the answer to state matters obviously true with technical fullness, we should not grant a certiorari on that ground.

We are of opinion that the sewer was a new sewer within the meaning of the act, and that it is sufficiently shown to have been so by the facts which we have stated. The suggestion that it is not a new sewer seems to have been an afterthought, and contrary to the purport of the petition. In view of our opinion on this point, and of the fact that the words of the act which we shall discuss require a new sewer, it is unnecessary to consider whether the legislature would not have had power to authorize an assessment for reconstructing

an old sewer or a new part of an old system. See Sears v. Commissioners, 173 Mass. 350, 53 N. E. 876; Carson v. Same, 175 Mass. 242, 56 N. E. 1, 48 L. R. A. 277.

We are of opinion, in the next place, that this sewer is within the words first above quoted from the act. It is true that the words, "within two years after any sewer is completed," taken by themselves, would seem to refer to a completion in the future. But we have to consider the whole section and the circumstances. Later on, as we have said, there is a general power to assess upon any estate heretofore or hereafter connected with a sewer, about which we say nothing except that it shows that the legislature had past work in its mind. But what is more important is that the section is enacted to replace the one which was held unconstitutional by this court, and its whole frame shows that it was intended among other things, to enable the city to collect the special assessment which it had failed to get under the earlier act. Indeed, this is the petitioner's argument, although aimed at a different conclusion. Taking this into account, and also that the section which we are construing was passed as an amendment to the act of 1897, we are of opinion that the words embrace at least sewers completed after the act of 1897 went into effect. We are not laying down a general rule of construction for amendments, but simply are construing this particular act as we think that the legislature meant it to be construed. No doubt if the amendment in a new clause not repeated from the amended section had read, "is hereafter completed," the general rule would take "hereafter" as referring to the date of the amendment, not to the date of the act. Ely v. Holton, 15 N. Y. 595, 598; Moore v. Mausert, 49 N. Y. 332, 335; In re Peugnet, 67 N. Y. 441, 445. See Parsons v. Circuit Judge, 37 Mich. 287; Farrell v. State, 54 N. J. Law, 416, 423, 24 Atl. 723.

Finally, we are of opinion that the act of 1899 is constitutional, so far as it applies to this case. The greater part of the petitioner's argument is made inapplicable by our decision that this was a new sewer, and is within the opening words of the section. We see no objection to the statute in the fact that the statute does not apply to any sewer built before a certain date, it does not matter precisely what. Such a limit of liability by time is no more unreasonable or contrary to any principle of constitutional right than is a statute of limitations. Again, it is not unconstitutional to levy special assessments for sewers already built. One must not let one's mind be led astray by the false analogy of executed consideration in contracts. Public works must be paid for although they have been constructed before any tax has been levied on their account. If the tax otherwise is levied properly as a special assessment for betterments, then, in view of the fact that the benefit and payment both are compulsory, not matter of contract, a betterment already executed when

the law authorizing the tax was passed will sustain the tax, as well as a work built with express notice that it is under the law. Butler v. City of Toledo, 5 Ohio St. 225; Howell v. City of Buffalo, 37 N. Y. 267, 273; Righten v. Mayor, etc., 45 N. J. Law, 104; Brevoort v. City of Detroit, 24 Mich. 322, 326; 2 Dill. Mun. Corp. (4th Ed.) § 814.

It is suggested that this statute is an attempt to exercise judicial functions, and to revive the decision in Sears v. Street Com'rs. We perceive no such attempt, except that the legislature is trying now to give a valid authority where formerly it gave a void one. State v. Mayor, etc., of City of Newark, 34 N. J. Law, 236, 240; Howell v. City of Buffalo, 37 N. Y. 267.

It is urged that the method of assessment is bad, as not being limited to the benefit received. It is unfortunate that the petitioner's argument is directed against the latter clause authorizing the board to assess a reasonable part of the cost upon any estate heretofore or hereafter connected with a public sewer. But we assume that he would wish to urge the same objection to the clause at the beginning of the section which we have decided to be applicable. That clause confines the assessment in terms to the estates especially benefited, and limits it to a proportional part of the cost, not exceeding four dollars per linear foot, but does not limit it in clear terms to the special benefit received. We are of opinion, however, that the word "proportional," as here used, must be taken to mean proportional to the special benefit received. See Carson v. Commissioners, 175 Mass. 242, 56 N. E. 1, 48 L. R. A. 277. We believe that we have dealt with all the objections to the assessment insisted on in the petitioner's argument, so far as they are applicable to our view of the facts and our construction of the statute.

Petition dismissed.

SANBORN *et al. v.* CITY OF MASON CITY *et al.*

(*Supreme Court of Iowa, May 23, 1901.*)

[86 N. W. Rep. 286.]

Sewer—Assessment—Manner of Making—Time.—An ordinance for the construction of a sewer in a certain district provided that the sewer committee should report the entire cost thereof on its completion and acceptance, and that each lot of land in the district should be assessed its proportion of the entire cost in constructing the same. Provision was then made as to the manner of making assessment "when the sewer authorized shall have been completed." Acts 25th Gen. Assem. c. 7, § 10, provides that, when such improvement shall have been completed, it shall be the duty of the council to ascertain the cost thereof. Section 11 declares that, when the whole or any part of the cost of constructing such sewer shall be required by ordinance to be paid by the proceeds of a sewer tax, said city shall have the power to levy the entire cost of such sewer at once upon all the taxable real property within such district. *Held*, that a special assessment for the construction of a sewer could not be levied and collected in advance of completion thereof.

Sanborn *v.* City of Mason City

Cost of Improvement—Tax Levy—Time of Levy—Construction of Statute.—Where, before the completion of a sewer, the city passed an ordinance directing that the probable cost of the entire improvement be estimated, and a tax levied for the payment thereof, and suit was brought to enjoin the enforcement of the assessment on the ground that such a tax was prohibited by Acts 25th Gen. Assem. c. 7, § 10, providing that, when such improvement shall have been completed, it shall be the duty of the city council to ascertain the cost thereof, and assess the same against the property benefited, a contention that the tax was valid on the ground that the time for the levy of the assessment as prescribed by such section was directory merely could not be sustained, since the vice in the ordinance was not in the time of the levy, but in the levy of a tax for the "estimated and unascertained" cost of the improvement, which was prohibited.

Appeal from district court, Cerro Gordo county; John C. Sherwin, Judge.

Mason City had been divided into sewer districts, through one of which (Willow Creek), by ordinance and resolution, the city council ordered the main artery of the sewer system to be constructed, in length 9,605 feet, of which 1,250 was to be open, and the remainder closed. The contract was let to Ford & De La Hunt, September 28, 1896, at the lump sum of $21,370, and on October 26th following $960 was added for covering the 1,250 feet which was to be open. The work was to be completed June 1, 1897, but, after about 2,600 feet of the sewer had been put in, the council, on December 8, 1896, extended the time to November 7, 1897, and paid the contractors $3,000. Work under the contract not having been resumed, on July 15, 1897, the council, by motion or resolution, estimated the cost of completing the sewer over and above the contract price at $6,670 to cover engineering and contingent expenses, and ordered "that levy of 5.7 per cent. be made on all real property included in the Willow Creek district." Proceedings were then taken resulting in making the levy, and properly certifying the same to the county auditor. The various tracts of land belonging to plaintiffs have been advertised for sale, to enjoin which this action was brought. To the petition alleging the foregoing facts in detail a general demurrer was sustained, and, as plaintiffs elected to stand on the ruling, their petition was dismissed, and they appeal. Reversed.

Cliggitt & Rule, for appellants.

R. Wilber, Blythe, Markley & Smith, and T. G. McDermott, for appellees.

LADD, J. The controlling question raised by the record is whether, under chapter 7 of the Acts of the 25th general assembly and the ordinance of the defendant city, a tax for the construction of the main artery of a sewer system of a particular district may be levied and collected on the real estate of the district in advance of its completion. That the ordinance contemplated a completion before the levy is put beyond controversy by the language employed. Section 6

thereof provides for a report of the entire cost by the sewer committee "upon the completion and acceptance of the sewer," and the assessment of "each owner and lot and parcel of land in said Willow Creek sewer district, according to its value, its proportion of the entire cost in constructing said sewer"; that is, the entire cost as found and reported by the committee "upon the completion and acceptance of the sewer" is to be distributed on the real estate of the district according to its assessed value. The following section directs the manner of making the assessment "when the sewer authorized by this act shall have been completed"; that is, by preparing a plat, issuing notices to landowners, hearing objections, etc. These are the only portions of the ordinance relating to the levy and the time of doing so. Without repealing or modifying this ordinance, it is at least doubtful whether the method prescribed for raising the funds for the sewer, if permitted by statute, might be abandoned for another; but that point is not argued, possibly for the reason that the chapter mentioned provides for no other mode. It has long been the policy in this state not to exact the payment of assessments for local or special improvements, such as street paving, gutters, and the like, as distinguished from those of the entire municipality, before their completion. Such has been the tenor of legislation from the organization of the state. Thereby the cost is definitely ascertained, and no more exacted from the property holder than is essential to meet it. Hence no provision is made for the return of any excess, as, under such a system, if computation is accurate, there can be none. Were money to be collected in advance on mere estimates, it might often happen, on the one hand, that enough would not be raised, and, on the other, an excess might remain unexpended. We think the provisions of chapter 7, Acts 25th Gen. Assem., not a departure from this policy. Under it the paving or curbing of streets and the construction of sewers must be done under contract made with the lowest bidder after public notice. Bonds or certificates to provide for the payment of the improvements are to be issued as the work progresses for not exceeding six-sevenths of its costs, and the proceeds derived from their sale "paid out on requisition of the council, accompanied by certificates of the city engineer or board of public works that the work has been done or material furnished to the amount of the requisition, and that it is required for the payment of the same." See sections 6–9. Section 10: "When any such improvement shall have been completed, it shall be the duty of the council to ascertain the cost of the improvement, and also what portion of such cost so assessable shall be assessed as provided by law or by ordinance of such city upon the property fronting or abutting or adjacent to the improvement." The remainder of this section relates to the assessment of railroad or street-railway property, and need not be set out. It thus appears that not until com-

pletion is the council required to determine the cost, and nowhere in the chapter is an estimate thereof mentioned. The following section relates to the manner of ascertaining the proportion of the cost to be levied against each parcel of ground, and is in two parts. The first makes provision for assessing lots fronting, abutting, or adjacent to the improvement. The assessments against these are necessarily according to the benefits received, whatever be the rules adopted for determining these. For this purpose a plat is to be made, with the amount assessed against each parcel of ground with other particulars indorsed thereon, public notice given that opportunity for inspection be afforded, and that objections thereto must be filed before the next meeting of the council; and said "council at such meeting, or as soon thereafter as practicable, and after hearing and deciding upon any objection so filed, if any, and after making all necessary corrections in the assessment, as proposed by said plat, shall assess and levy as a special tax upon the property of each owner, liable to special assessments as aforesaid, its just and true proportion according to law and according to said assessments proposed by said plat as corrected and approved of the amount to be specially assessed for any such improvement." Thus considerable time of necessity elapses for the accomplishment of the proportionate distribution of the cost to the several properties beneficially affected. But, when this is to be paid by the property owners of an entire district according to its assessed value, there is no occasion for notice and hearings. The distribution of the burden is then a mere matter of computation. Hence the second part of section 11 reads: "Provided, that when the whole, or any part of the cost of constructing a sewer, shall be required by ordinance of any city to be paid by the proceeds of a sewer tax, to be levied upon all the property of any sewer district, according to valuation, that said city shall have the power to levy the entire cost of such sewer, required to be paid by such sewer district, at once upon all taxable real property within such district, and determine by ordinance or resolution the whole percentage of tax necessary to pay such cost, and the percentage to be paid in any one year, and when the same shall become delinquent, and such taxes shall be entered, and payable and collectible, as other special taxes in this chapter provided for; and said city shall have the right to issue bonds in anticipation of the payment of such taxes in the same manner, and with the same effect, as herein provided for bonds issued for taxes levied upon specified abutting, or adjacent property." "At once," as here employed, evidently refers to the time when the cost is ascertained by the council under section 10, and what is meant is without the delay incident to the preceding part of section 11. The "entire cost" of such sewer, not its estimated or probable cost, may be levied on the property of the district. No provision whatever for ascertaining the cost,

other than that quoted from section 10, is found in the chapter, and to that cost the portion of the section set out must refer. If so, then the law contemplated the assessment and levy after the completion of the improvement for the payment of its actual cost, and not before, to cover the estimated or probable costs.

2. But it is argued that the statute with respect to the time of making the levy is merely directory, and a substantial compliance therewith is sufficient. This might be true had it been made for the purpose contemplated by law. There is no provision for raising money for the estimated or probable cost of a proposed improvement. It is only for the ascertained cost of a completed improvement that the tax may be exacted. The question does not so much involve the time or manner of performing an authorized act as it does of doing something wholly unauthorized. In other words, it is the object of assessment and levy, and not the time and mode of making it, which was ignored by the city council; and we know of no authority holding that this is not of the essence of the thing to be done, and the statute relating thereto mandatory. See Hubbell v. Polk Co. (Iowa) 76 N. W. 854.

Reversed.

SHERWIN, J., took no part.

BLOUNT *v.* PEOPLE *ex rel.* RAYMOND.

(*Supreme Court of Illinois, Dec. 20, 1900.*)

[59 N. W. Rep. 241.]

Improvements—Assessments—Jurisdictional Defects—Judgment—Collateral Attack.—Failure of an improvement ordinance to state the height of the curb to be constructed on each side of the street is not a jurisdictional defect, making the judgment confirming a special assessment therefor subject to collateral attack, and hence is no defense to an application for judgment of sale for delinquent installments.

MAGRUDER, J., dissenting.

Appeal from Cook county court; O. N. Carter, Judge.

Suit by the people, on the relation of Samuel B. Raymond, against F. M. Blount. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. E. O'Neill, for appellant.

Chas. M. Walker, Corp. Counsel, Armand F. Teefy, and William M. Pindell, for appellee.

HAND, J. This is an application for judgment for sale by Samuel B. Raymond, treasurer and ex officio collector of the county of Cook, for the delinquent second installment of a special assessment levied and assessed by the authority of the city of Chicago, by virtue of an ordinance passed by the city council of said city, and approved by the mayor on the 22d day

of June, A. D. 1896; said ordinance being for the improvement of Clifton Park avenue from the south line of Douglas Park Boulevard to the north line of Ogden avenue. To the application for judgment for sale, appellant filed various objections,—among others, the following: "(6) Because said ordinance is illegal, void, and of no effect whatever; (7) Because the supreme court of Illinois, in the case of Newkirk v. City of Chicago, reported in 180 Ill., at page 142, 54 N. E. 1096, has declared said ordinance under which said special assessment was levied to be illegal, void, and of no effect, and has set said special assessment aside." In the case of Newkirk v. City of Chicago, supra, which was a writ of error to the county court of Cook County, we reversed a judgment of that court confirming a special assessment on the ground that the ordinance (which was similar to this ordinance) failed to state the height of the curb required to be constructed on each side of the street. That was a direct proceeding to reverse the judgment, while this attack is collateral. A judgment of confirmation of a special assessment cannot be collaterally attacked, except for matters going to the jurisdiction of the court in entering the judgment. Steenberg v. People, 164 Ill. 478, 45 N. E. 970; People v. Lingle, 165 Ill. 65, 46 N. E. 10; Gross v. People, 172 Ill. 571, 50 N. E. 334; Rich v. City of Chicago (Ill. Sup.) 58 N. E. 306. A defective or erroneous specification in an ordinance is not a defense on an application for judgment of sale, unless of such a character as to render the ordinance void. In this case, while the ordinance is defective, it is not void. The court had jurisdiction to render the judgment of confirmation, and when attacked collaterally, as it is here, it will be sustained. In the case of Gross v. People, supra, we say (page 573, 172 Ill., and page 335, 50 N. E.): "The rule is that unless there is a total failure to include in an ordinance the necessary element of a specification of the nature, character, locality, and description of the improvement required by the statute, the mere fact that the specification is defective in some respects will not be a defense on the application for judgment on the delinquent list." And in Foster v. City of Alton, 173 Ill. 587, 51 N. E. 76 (on page 592, 173 Ill., and page 77, 51 N. E.): "If the assessment is not questioned in the direct proceeding, and there is a description of the improvement in the ordinance, although loose or defective in some particulars, it does not render the ordinance a nullity, and the judgment of confirmation is not subject to collateral attack."

We find no error in this record. The judgment of the county court will therefore be affirmed. Judgment affirmed.

MAGRUDER, J., dissents.

BRANDS *et al. v.* CITY OF LOUISVILLE.

(*Court of Appeals of Kentucky, May 29, 1901.*)

[63 S. W. Rep. 2.]

Recovery of Street Assessment Paid under Mistake of Law.—As the rule forbidding the recovery of municipal taxes voluntarily paid applies also to street assessments, property owners who have under mistake of law, paid assessments for street repairs for which the city alone was liable, cannot recover the amount from the city on the ground that it was a debt of the city, paid by its order to the contractors.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Margaret Brands and others against the city of Louisville to recover money paid under mistake of law. Judgment for defendant, and plaintiffs appeal. Affirmed.

Stanley E. Sloss, Zack Phelps, W. W. Thum, and Lane & Harrison, for appellants.

H. L. Stone, for appellee.

HOBSON, J. On July 13, 1891, the general council of the city of Louisville passed an ordinance for improving the streets of the city with vitrified brick, which contained, among others, this provision: "The contractor shall guaranty the performance of his contract according to this ordinance, and the pavement therein specified and the material composing the same shall be kept in good repair for a period of five years from the completion of the work and the acceptance by the general council; and to protect the city as to the character of said work and material and such repairs as may be needed, the city engineer to be the judge, the contractor shall deposit bonds of the city of Louisville or of the United States amounting to ten per cent. of the original contract price of the entire work with the city treasurer, who shall hold the same, principal and interest, to be applied as far as need be in the necessary repairs of said work, and at the end of the said five years the unexpended balance, if any, to be subject to the order of said contractor." Pursuant to this ordinance, and others of similar character, a number of vitrified brick streets were built in Louisville, and the cost of their construction apportioned among the owners of property fronting thereon. After this, in Gosnell v. City of Louisville, 20 Ky. Law Rep. 519, 46 S. W. 722, this court held that, where there was an improvement of the carriageway of the public street by original construction with vitrified brick pursuant to these ordinances, the 10 per cent. of the cost was for the reconstruction or repair of the street for five years, and that for such cost of reconstruction or repair the city was alone liable, and no part of it could be collected from the property owners. Appellants, who had paid their apportionments thereupon, filed this action against the city, suing in equity, not only for themselves, but all

other property owners of the city who had paid similar assessments, and sought to recover from the city the amounts so paid the contractors on the grounds that, at the request of the city, they had paid a debt of the city to the contractor, and that, as the city was alone liable for the debt, and they had paid it by direction of the city, and in ignorance of their rights, the city should reimburse them. The learned chancellor sustained a general demurrer to the petition, and dismissed the action.

In Underwood v. Brockman, 34 Ky. 318, 29 Am. Dec. 407; Ray v. Bank, 42 Ky. 514, 39 Am. Dec. 479, and a number of subsequent cases it has been held that, where money is paid under a clear mistake of law or fact, which in equity and good conscience should not be retained by the party receiving it, a recovery may be had. This may be regarded the settled law of this state, although the rule, so far as mistakes of law are concerned, is denied in many other states. But, while this rule has been consistently maintained by the court, it has not been applied to taxes or public dues which have been voluntarily paid where they were only collectible by action. Thus, in City of Louisville v. Zanone, 58 Ky. 151, the plaintiff sought to recover from the city money he had paid to a contractor for the improvement of the street in front of his property on the ground that the ordinance under which the improvement was made had been passed by only one board of the general council, and was therefore invalid. It was held that, as he had voluntarily paid the assessment, he could not recover. In Hubbard v. Hickman, 67 Ky. 204, 96 Am. Dec. 297, the plaintiff sued to recover municipal taxes which he had paid for 10 years. It was held that the law does not imply a promise on the part of the city to make restitution for taxes levied and paid under a mistake of law. This ruling was followed in Moore v. Bath Co. Ct., 70 Ky. 177. In City of Louisville v. Anderson, 79 Ky. 343, a recovery was sought of taxes paid under a void ordinance. A recovery was had. But the court said: "Where a party is entitled to a day in court, and can litigate the demand about to be enforced against him, but, instead of doing so, voluntarily pays it, he is without a remedy. When he can plead and make his defense, a payment under protest will be regarded as voluntary; or, if he has an option either to litigate the question or submit to the demand and pay the money, in all such cases there is no compulsion, and relief will be denied." In Louisville & N. R. Co. v. Hopkins Co., 87 Ky. 613, 9 S. W. 497, suit was brought to recover county taxes paid by the railroad company, for which it was not liable in law. But the rule laid down in the cases above referred to was held to preclude a recovery. The court said: "In all the cases wherein it has been decided by this court taxes illegally paid might be recovered back, including Fecheimer Bros. & Co. v. City of Louisville, 84 Ky. 306, 2 S. W. 65, referred to by counsel, the

payments were regarded as involuntary, because the tax collector had authority to levy and sell on the refusal to pay. As said by this court, 'The process is summary, and in the hands of the party making the demand, and the taxpayer must submit to the levy or pay the money.' The only exception, under the statute of this state, exists in respect to railroad corporations, whose property, from considerations of public convenience and necessity, cannot be levied on and sold to pay taxes, and the collection must be enforced by judicial proceedings." "The payment by the L. & N. Railroad Co. of the taxes which it now seeks to recover back from the counties of Christian and Hopkins was made voluntarily, and in no sense under compulsion, and, such being the fact, we see no reason to make in these cases an exception to the general rule, laid down in City of Louisville v. Anderson, that the party paying taxes, who is entitled to a day in court, and can litigate the demand about to be enforced against him, but, instead of doing so, voluntarily pays it, is without remedy." In Louisville & N. R. Co. v. Marion Co., 89 Ky. 531, 12 S. W. 1064, these cases were approved, and, after discussing the rule at some length, the court said: "Considerations of public policy require this rule, and the taxpayer cannot complain with grace, because he has, by his own neglect, missed the opportunity afforded him by law for his protection." The doctrine of these cases was applied to an assessment for local improvement which had been voluntarily paid, and was sought to be recovered from the city, in Henderson v. Breckinridge, 3 Ky. Law Rep. 387. These cases are in accord with the authorities elsewhere. See Desty, Tax'n, p. 790; Dill. Mun. Corp. § 944; Cooley, Tax'n, 565–567. It is ably insisted for appellants that these authorities do not apply, for the reason that the property owners were under neither a legal nor moral obligation to pay for the repair of the street in front of their property for five years, and that, as this was solely the debt of the city, it should not be allowed to place upon them a burden for which the law did not make them liable. There is great force in the argument that in equity the city should be held liable to the property owner for the amount paid by him to the contractor on the order of the city by mistake, in ignorance of his rights, when the amount so paid was purely the debt of the city. But the court is of opinion that the reasons of public policy which sustain the cases above cited apply with equal force to the case before us. Reduced to its last analysis, the case comes to this: The city assessed against the appellants' property for the improvement of the street in front of it an amount larger by 10 per cent. than it should have assessed. If a recovery can be had in this case, then one may be had in every case where the burden is wrongfully apportioned, although the assessment has been voluntarily paid. Such a rule would involve the city government in inextricable confusion. The council could not

know what liabilities might be anticipated, or what taxes should be levied. Under the constitution the levy of taxes must specify the purpose for which the tax is to be used, and a tax levied for one purpose cannot be applied to another. The reason for the rule denying a recovery of taxes voluntarily paid is, after all, the security and efficiency of the city government; and every reason which forbids the recovery of municipal taxes that have been voluntarily paid seems to us to apply with equal force to assessments for municipal improvements. The city is required to make the apportionment. If an error is made, it is the duty of the property owner, no less than the city officials, to detect and correct it. If, instead of doing this, he voluntarily pays the assessment, and the city makes other contracts and assumes other obligations on the idea that these matters are all settled, it seems to us that sound public policy requires the loss to fall on the taxpayer who has acquiesced in the assessment and voluntarily paid the money rather than litigate the right. Judgment affirmed. Whole court sitting.

GUFFY, J., dissenting.

TULLER *v.* CITY OF DETROIT.

(Supreme Court of Michigan, May 7, 1901.)

[85 N. W. Rep. 1080.]

Special Assessment—Sale—Irregularities—Objections of Property Owners—Laches—Estoppel.—An assessment for grading and paving a street in 1889 was not paid, and the property was sold in 1890, and bid in by the city. *Held* that, after the lapse of so many years, abutting owners who sat by and saw the improvement cannot be permitted to set up any irregularity in failure of the assessor, in returning the roll to the common council, to attach a certificate that the assessment was made in accordance with the city charter.

Appeal from circuit court, Wayne county, in chancery; Morse Rohnert, Judge.

Action by Elizabeth Tuller against the city of Detroit. Judgment for plaintiff, and defendant appeals. Reversed.

Timothy E. Tarsney, for appellant.
Flowers & Moloney, for appellee.

LONG, J. The complainant is the owner of certain premises in the city of Detroit. In the year 1889 proceedings were taken by the city to grade and pave the street adjoining her premises. No complaint is made of the proceedings or their regularity, except that the board of assessors returned the roll to the common council without attaching thereto or indorsing thereon a certificate showing that the assessment of the property was made in accordance with the provisions of the charter, which, complainant's solicitor alleges, should have been done. The claim is made that the omission of such certificate is fatal to the right of the city to enforce the pay-

ment of the tax assessment. It appears that the tax assessed was not paid, and that the property was sold and bid in by the city in 1890. This bill is filed to cancel the sale and set aside the tax. The court below granted the relief prayed, and the city has appealed.

We think it wholly unnecessary to discuss or determine the question whether a formal certificate to the roll was necessary to its validity. The complainant, now, after the lapse of so many years, and after sitting by and seeing the improvement made, and her property benefited thereby, cannot be permitted to set up such irregularity, if it be an irregularity, to defeat this assessment. The case falls squarely within the rule laid down in Lundbom v. City of Manistee, 93 Mich. 170, 53 N. W. 161; Byram v. City of Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526; Fitzhugh v. City of Bay City, 109 Mich. 581, 67 N. W. 904. The decree of the court below must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts. The other justices concurred.

McNAMEE v. CITY OF TACOMA.

(*Supreme Court of Washington, April 13, 1901.*)

[64 Pac. Rep. 791.]

Special Assessments—Notice to Property Owners—Objections.—Where a common council has regularly assessed property for street improvements, and given notice to property owners to file objections to the assessment within a certain time, as required by statute, an owner who fails to so object cannot thereafter collaterally attack the validity of the assessment.

Reassessment—Basis of Benefits—Constitutional Law.—The act of 1893 (Sess. Laws 1893, p. 226), pointing out a method of reassessment for street improvements where an assessment has been determined invalid, provides that the reassessment shall be on the basis of benefits, and is constitutional.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Suit by Charles McNamee against the city of Tacoma. From a decree in favor of plaintiff, defendant appeals. Reversed.

William P. Reynolds and Emmet N. Parker, for appellant. Stiles & Nash, for respondent.

DUNBAR, J. The plaintiff is the owner of certain lots in the city of Tacoma. In the year 1892 the city improved the street upon which the lots fronted, and assessed the lots in a certain amount. Thereafter, in October, 1894, said assessment was set aside and annulled. In July, 1896, a new assessment was made under a proper ordinance, and in September, 1896, the commissioner of public works of the city of Tacoma —he being the proper authority and officer so to do—made

and certified to the city council a reassessment roll, under the authority of Ordinance No. 1004 and the law of 1893, to the effect that, having examined the property and said improvements to determine how much each separate tract was benefited thereby, he found that each of said lots, pieces, or parcels of land described in the assessment roll was benefited by the said improvement in the amount set opposite said tract in the column marked "Amount of Reassessment in the within Roll," and found that the actual cost of said improvements was equitably apportioned to the property described according to the benefits received by each lot. Thereafter due notice of the assessment was given, and of the time when objections thereto would be heard by the city council. No objections having been made, and the assessment becoming delinquent, the lots in question were duly sold, and the city of Tacoma bought them in. All the steps from the assessment to the sale were substantially complied with. This is an action brought by the owner against the city to remove a cloud from the title, he claiming that the assessment was illegally made. The court found that the labor, material, and money expended upon said improvement were of no benefit whatever to the property abutting thereon, and that the assessment was made without reference to benefits, but was made on a front-foot basis; and from such finding concluded that the provisions of the charter of the city of Tacoma violated the constitution of the United States, for the reasons that the same did not recognize a benefit to such lots and parcels as a basis of such assessment; that the act of the legislature of the state of Washington approved March 9, 1893, providing for a reassessment of the cost of local improvements, was unconstitutional for the same reason; that the reassessment of plaintiff's lots was null and void; that the plaintiff was not estopped from maintaining this suit by his failure to file objections to said reassessment; that he was entitled to the relief prayed for. Judgment was entered accordingly. If the statement in this case had been a little more elaborate, it would have been exactly the statement made by this court in the case of Annie Wright Seminary v. City of Tacoma (Wash.) 62 Pac. 444, with the exception that in this case the action is to remove a cloud, and in that case it was to enjoin the collection of a tax. We do not care to again discuss the questions which were discussed in that case. There it was held that, where a common council has regularly reassessed property for street improvements, and has given notice to property owners to file objections to such assessment within a certain time, as required by statute, an owner who fails to so object cannot afterwards dispute the validity of the assessment in an action to foreclose the assessment lien. So that, under that decision, which we now approve, the finding of the court in relation to the manner in which the assessment was made is utterly immaterial. This court has often said—and the cases are

cited and quoted from in the Annie Wright Seminary Case, supra—that, the law having provided a tribunal to determine those questions, where the parties had had notice of the time when such questions would be determined, and had not appeared, the decision of the tribunal as to them was conclusive. It will be remembered that this is a collateral attack upon the assessment, and not an appeal, as was the case in many of the cases cited by the respondent. So that there is only one additional question in this case, and that is the constitutionality of the act of 1893. This act was also attacked by counsel for the respondent in the case of Annie Wright Seminary v. City of Tacoma, supra, but probably not quite so elaborately as by counsel for the respondent in this case. It is also insisted by counsel for respondent here that the court should place a different construction upon the statute of 1893, since the publication of the case of Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. Village of Norwood v. Baker was also cited by counsel for respondent in the Annie Wright Seminary Case, and we are not able to see that the announcement of the rule in Village of Norwood v. Baker can or ought to in any way affect the judgment of this court in relation to the constitutionality of the act of 1893. The Norwood Case only announces the doctrine that the assessment must be tested by the benefits, and that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. It is not a new doctrine which is announced, as is shown by the authorities brought to its support by the writer of the opinion, and the principle was recognized by this court when it upheld the constitutionality of the law of 1893. But it is contended by counsel that the law of 1893 would not bear the construction placed upon it by this court, and that it is not really a statute providing for assessment according to benefits. This court has said that the statute meant assessment by benefits, and that practically makes the statute mean it, and the construction of the statute placed upon it by this court will be followed by the supreme court of the United States. The statute in no way invaded the constitutional right of the owner of property in municipalities, and, the assessment having been made in conformity with the statute and of legal municipal laws, the judgment will be reversed, and the cause dismissed.

REAVIS, C. J., and FULLERTON, MOUNT, and ANDERS, JJ., concur.

J. L. LOMBARD, E. A. Cummings, W. H. Doble, *et al.*, Plffs. in Err., *v.* WEST CHICAGO PARK COMMISSIONERS.

(*Argued January 31, 1901. Decided April 8, 1901.*)

[21 Sup. Ct. Rep. 507.]

Constitutional Law—New Special Assessment after First Has Been Held Illegal.—Where a special assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work.

Validity of Municipal Ordinance—Whether State or Federal Question.—Whether a municipal ordinance is or is not valid, and the extent to which it is so, having regard to the state Constitution and laws, is wholly a state, and not a Federal, question which can be reviewed by the Supreme Court of the United States on writ of error to a state court.

Benefits—Second Estimate Different from First—Not a Federal Question.—The decision of the supreme court of a state that it is competent on a new assessment to determine questions of benefit from the proof, even though in so doing a different result is reached from that which had been arrived at when a former assessment, which has been set aside, was made, decides a local, and not a Federal, question.

In Error to the Supreme Court of the State of Illinois to review a decision affirming a decree sustaining assessments for benefits. Affirmed.

See same case below, 181 Ill. 136, 54 N. E. 941.

Statement by MR. JUSTICE WHITE:

The West Chicago park commissioners, in virtue of authority vested in them by the laws of the state of Illinois, proposing to improve Douglas boulevard, and requiring a special assessment to enable them to pay for the work, applied, as the law directed in such case, to the municipal authorities of West Chicago to cause such special assessment to be levied and collected according to law. In March, 1893, the town, acting on this request, adopted an ordinance providing for executing the work and for a special assessment on the abutting property to pay for the same. The only provision of this ordinance which it is essential to note for the purposes of the issues which are now before us is the 2d section thereof, which provided that the sum of the assessment when made should be payable in instalments, the first being 20 per cent. of the whole, and the deferred portions to bear interest at a rate fixed in the ordinance. Following the requirements of the state laws, after the passage of this ordinance application was made to the county court of Cook county to take the necessary steps to execute the provisions of the ordinance. Pursuant to the directions of the Illinois statutes the court appointed commissioners, who examined and made a full report on the work, and exhibited an assessment roll stating the sum due by the abutting property; the amount assessed on each piece being stated to have been fixed in accordance with the benefits which it was ascertained would result to each piece from the performance of the contemplated work. After

notice to those concerned to appear and urge objections, if any they had, to the assessment roll, and after due proceedings in which ample opportunity was afforded to resist the assessment, the court passed a decree of confirmation fixing the amount due by each piece of property in accordance with the report of the commissioners, and declaring that the sum assessed against each piece of property did not exceed the benefit conferred on the property. This decree, however, did not in all respects uphold the assessments made by the commissioners, as it sustained the objections of certain property holders on the ground that the sum assessed against them exceeded the benefits, and as to these objecting property holders the amount assessed was reduced to correspond with what the court concluded was the actual benefit shown to result. J. L. Lombard was the owner of a piece of property within the assessment district, which had, it seems, been omitted from the roll returned by the commissioners. The decree recited that this property (describing it) had been by consent found to be within the district, and would be benefited to a certain amount, and the sum of this benefit was by consent awarded against the property as described. The assessment, the decree of confirmation provided, was to be paid in instalments as specified.

The collection of the assessment proceeded according to the roll, and the execution of the proposed improvement was undertaken. Some of those who were assessed paid; others did not; and on proceedings being taken as authorized by the laws of Illinois to enforce payment, a controversy arose which, in its final stage, was considered by the supreme court of the state of Illinois, and the court decided that the assessment was void and could not be enforced. The reasoning by which the court so decided was this: That under the statutes of Illinois there was no authority to provide for a payment of a special assessment in instalments, and therefore, as the ordinance had fixed that method of payment, it was void. Culver v. People ex rel. Kochersperger, 161 Ill. 89, 43 N. E. 812. And the principles of this case was applied in subsequent cases. Farrell v. West Chicago, 162 Ill. 280, 44 N. E. 527; Connor v. West Chicago, 162 Ill. 287, 44 N. E. 1118; White v. West Chicago, 164 Ill. 196, 45 N. E. 495. The improvement had in the meanwhile been constructed. The West Chicago park commissioners, after the decisions in question, dismissed the previous proceedings which had taken place in relation to the assessment. In July, 1895, an act was passed by the legislature of Illinois, which authorized park authorities, whenever a special assessment had been declared void by a court of competent jurisdiction, to "collect a new special assessment on property benefited by said improvement, or completed portion thereof, in the same manner as in other cases, and the lots, blocks, tracts, or parcels of land found benefited by said improve-

ments, or the completed portion thereof, shall each severally be liable to pay for said benefits to the same extent and the same proportion as in other cases." Hurd's Statutes of Illinois, 1899, chap. 105, § 20, p. 1244.

After the passage of this law the West Chicago park commissioners in July, 1896, adopted an ordinance providing an assessment to pay for the work of improving Douglas boulevard, which had been completed, as above stated. The 1st section of the ordinance, by way of preamble, recited the occurrences substantially as above stated. The 2d and 3d sections were as follows:

"Sec. 2. That a new special assessment on the property benefited by said improvement, to the amount that the same may be legally assessed for, be levied to pay the cost of said boulevard improvement above specified, and the remainder of such cost be paid by general taxation, viz., from the general funds of this board, all in accordance with an act of the general assembly of the state of Illinois, entitled 'An Act to Enable the Park Commissioners or Park Authorities to Make Local Improvements, and Provide for the Payment thereof,' approved June 24 and in force July 1, 1895.

"Sec. 3. That the estimate of the cost of the said improvement be made by this commission and spread of record."

Subsequently the park commissioners made an estimate and report, and application was made to the county court of Cook county for the enforcement of an assessment roll prepared by the park commissioners in accordance with the estimate. This roll stated the total amount of the cost of the work, and charged the individual proprietors in the aggregate with a large portion of the total amount because of the special benefits conferred by the work upon them; the remainder—an insignificant part—of the cost was charged to the public, because of the general benefit to the public, which, it was found, had been produced by the doing of the work. The sum charged against the individual property holders was distributed among them; and this distribution was shown by a statement containing the name of the owners, the lot owned by him, the total amount of the assessment, the sum to be deducted from this total in consequence of the instalments which had been paid on the former and void assessment, the net result of the benefit after making this deduction being stated in a separate column. To this roll was appended the certificate of the park commissioners, as required by law, that—

"Before entering upon their said duties they examined the locality where the said completed improvement has been made, and the lots, blocks, tracts, and portions of land which are specially benefited thereby, and did estimate what proportion of the total cost of said completed improvement is of benefit to the public, and what proportion thereof is of benefit to the property benefited, and did apportion the same

between the said park district and such property, so that each should bear its relative equitable portion; . . . that having found said amounts they did apportion and assess the amount so found of benefit to said property upon the several lots, blocks, tracts, and parcels of land in the proportion in which they are benefited by said completed improvement, and that no lot, block, tract, or parcel of land has been assessed the greater amount than it has been actually benefited thereby; that said assessment roll also shows the credit to which each lot, block, tract of land so specially assessed is entitled to, if any, for or on account of payments on previous assessments or instalments thereof, and the net amount of benefits assessed thereon."

The amount of the assessment against the individual lot-owners for benefits in the new roll differed from the sum assessed in the previous one. Indeed, the new roll disregarded the reductions which had been decreed in the previous proceedings as to certain of the lot owners, since it increased the amount due by these owners over the sum fixed by the previous decree. The property of Lombard, which had been placed upon the previous roll by consent at a particular amount, was placed upon the new roll for a larger sum than that shown in the previous roll. After publication of notice of the filing of the roll the present plaintiffs in error appeared in the county court of Cook county and objected to the confirmation of the roll. The objections which were urged were numbered from 1 to 18, and denied the validity of the new roll upon many grounds, all of which involved purely matters of local and non-Federal concern. They subsequently filed a motion to cancel the assessment on eight specified grounds, none of which involve the Constitution or laws of the United States. And this is also true of amended objections which were filed. Later, additional objections were filed, numbered from 1 to 5. The 1st charged, in general terms, that the assessment and the proceeding to confirm the same were in violation of the 14th Amendment to the Constitution of the United States; the 2d, that as the proceeding was not authorized by any valid ordinance at the time the work was done, to confirm the assessment under the assumption that it was sustained by the act of 1895 would be a violation of the 14th Amendment to the Constitution of the United States; the 3d charged that, as the ordinance under which the previous assessment was made had been held to be void, there was no authority for doing the work at the time when it was done, and hence to enforce the subsequent ordinance would also violate the 14th Amendment; the 4th but reiterated that as the work was completed before the Illinois act of 1895 had been passed, to construe that law as authorizing the assessment would also violate the Constitution of the United States; and the 5th repeated in different form the same proposition by asserting that the law of 1895, if held to be retroactively

applicable to the work which had been completed at the time of its passage, would be repugnant to the 14th Amendment to the Constitution.

On the hearing, by objections to evidence, by motions to strike out, and by additional pleadings, the grounds above stated were repeated, but were all overruled. Following this, it is stated in the bill of exceptions,—

"And thereupon all the said motions and legal objections having been disposed of, the said cause came on to be tried upon the objections triable by a jury; and thereupon it was stipulated in open court by the petitioners and by said objectors that the said cause should be submitted to the court for trial without a jury upon the said issues, and upon the same evidence in all respects which has been offered upon the said motions and legal objections as hereinbefore set forth, without recalling witnesses or introducing or recalling or offering the said testimony, the same to be treated as having been offered upon the said issues, which was all the evidence offered on the said hearing. And thereupon the objectors contended that it was shown by the said evidence that the property of the said objectors and each of them, severally, was assessed more than its proportionate share of the cost of the said improvement; but said objections were overruled, and the court found the issues for the petitioners. . . . "

The decree which was entered expressly found that in each particular case the property assessed was benefited to the sum of the assessment. An appeal was taken from this decree to the supreme court of the state of Illinois, and on such appeal errors were assigned numbered from 1 to 20. They repeated in various forms of statement all the objections of a Federal nature which had been previously urged and asserted, besides a number of grounds of purely local concern. The supreme court of Illinois decided that, although it was settled by a course of decisions in that state that there must exist authority for making a special assessment at the time the levy was made and before the work was done, yet the original ordinance under which the first assessment, which had been declared illegal, was made, afforded such an authority. Construing its former opinions, the court said that, whilst it had declared the previous assessment to be void because it provided for a payment in instalments contrary to the state statutes, nevertheless the ordinance to the extent that it directed an assessment remained, albeit it had been held that the provision as to payment by instalments could not be enforced. The court then reviewed all the various objections to the form of the assessment, and held them to be without merit. It, moreover, decided that as the previous assessment had been set aside because of the instalment feature, that the sums fixed therein were not conclusive, and on the new assessment it was competent to re-examine the question of benefits and to restate the amounts due, even although, in doing so,

it was ascertained that a larger sum was assessable upon some portions of the property than had been decreed by the order which confirmed the previous assessment. As to the property of Lombard, the court decided that the proof established that a change in condition had caused the property to be justly assessed for a larger proportion of benefit than had been attributed to it by consent in the first assessment. 181 Ill. 136, 54 N. E. 941. To this decision the present writ of error is prosecuted.

Messrs. Nathan Grier Moore, John P. Wilson, and Wm. B. McIlvaine for plaintiffs in error.

Messrs. Robert A. Childs and Charles Hudson for defendants in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

The assignments of error contained in the record are nine in number, and eleven in addition have been made since the record was filed in this court. The question whether the benefit accruing to each particular piece of property assessed equaled the sum of the assessment placed thereon was foreclosed by the findings of fact of the trial court, to which court the case was submitted without the intervention of a jury. It is suggested, although under the statutes of Illinois a special assessment can only be made for the amount of the benefit shown to exist, this is of no concern in this case, since this levy is not a special assessment, but is a special tax. Where a special tax is imposed under the law of Illinois, it is asserted, no inquiry into the benefits can be had, and, therefore, there arises the question whether the levy was invalid as exceeding the benefits to be derived, since all investigation into the amount of the benefits was, as a matter of law, excluded. But this proposition is plainly an afterthought. From the statement of the case which precedes, it is apparent that the objectors to the assessment considered that their defense raised the issue of benefit, that they tendered proof, submitted the question to the trial court without a jury, and had an award against them. It is plain, also, that this contention was not raised by the assignment of errors in the supreme court of Illinois, and such question was not by that court in any way considered. Putting out of view questions of form, the principal contentions made in the supreme court of Illinois, as shown by the assignment of errors in that court, were as follows: That as under the law of the state of Illinois, an authority existing at the time the work was done was necessary to justify an assessment, a violation of the 14th Amendment would be brought about by holding that authority for the assessment was supplied by the Illinois act of 1895, since such law was enacted after the work was completed; and that as the previous ordinance had been declared void by the supreme court of Illinois, to hold such void ordinance to be an authority for the subsequent assessment would also violate the 14th

Amendment, since it would amount to a want of due process of law and a denial of the equal protection of the laws. And these propositions, stated in varying form, really express every substantial issue raised by the twenty assignments which are here pressed. We do not take up each assignment in detail to show that this is the case, since a statement of them all, as summed up in argument of counsel, is in the margin,* and renders a more detailed enumeration unnecessary.

The power of the state of Illinois to levy a special assessment in proportion to benefits, for the execution of a local work, and the authority to confer on a municipality the attribute of providing for such an assessment, is not denied.

It is no longer open to question that where a special assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work. Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921.

With these two propositions in mind it is certain that if the power flowing from the ordinance which the supreme court of the state of Illinois upheld existed prior to the work, the assessment was valid. So, also, if the authority was only

*"1st. As the court will see, this is a hard case. The controversy arises out of an effort to compel a ribbon of land 125 feet wide, along the margin of a boulevard 250 feet in width, decorated and ornamented as a park, to pay the entire cost of its improvement, although it is made for the general benefit of the inhabitants.

"2d. The original ordinance for the improvement was declared by the supreme court, in a direct proceeding, to be void, and so utterly without effect as to form no basis for an adjudication thereon by the county court.

"3d. The Constitution and laws of the state, as uniformly construed, permit no such charge to be created against private property without a previous valid ordinance providing that the cost be paid by special assessment or special tax.

"4th. The previous assessment having been extinguished completely by the decision of the supreme court, there remained no authority of law to charge this property. The legislature thereupon passed a law, after the work had been completed, providing that, notwithstanding the said provisions of the Constitution of the state, the work previously completed might be charged upon the private property by a procedure therein for the first time provided.

"5th. On the application for such an assessment the property owners protested, setting up the provisions of the Constitution of the United States in denial of the right.

"6th. The courts of the state, although they had held the original ordinance *void*, so as to confer no jurisdiction on the courts even to consider it, held that it was *valid* for the purpose of creating a charge on property of plaintiffs in error.

"7th. If the ordinance was in fact valid, then the original judgment of confirmation, reducing this assessment, was valid and effectual, and should have been applied here.

"8th. By the whipsawing process we have referred to, the courts of the state have held that the ordinance of March 28, 1893, was *void*, so as to deprive plaintiffs in error of the benefits of its adjudication reducing the amount of their assessment; but *valid* for the purpose of creating a charge upon their property.

given subsequent to the work, it was, from the point of view of the Constitution of the United States, legally conferred. In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned. The contention advanced, therefore, amounts to this, that a violation of the Constitution of the United States has been produced by the exercise of a power which, whatever view may be taken, could be brought into play without giving rise to a conflict with such Constitution. But in effect, it is asserted, this deduction is inapposite to this case, since the proposition here relied upon is that the supreme court of the state of Illinois maintained the assessment on a void ordinance, and therefore in effect decided that a valid assessment could be made where there was no authority whatever for the levy. This, however, rests upon an entirely false assumption, since it is manifest that the court below held that there was a valid ordinance, that is, one which sufficiently conferred the authority to make the assessment. Whether the ordinance was or was not valid, and the extent to which it was so, having regard to the state Constitution and laws, was wholly a state, and not a Federal, question, and we are not concerned with it. Accepting the conclusion of the supreme court of the state of Illinois as to the existence of the ordinance by virtue of the state law and Constitution, the proposition pressed upon us comes to the result which we have above indicated, and therefore is obviously without merit. Indeed, the misconception involved in the argument was pointed out in Castillo v. McConnico, 168 U. S. 674, 42 L. Ed. 622, 18 Sup. Ct. Rep. 229. There it was asserted that a particular assessment was void because of a mistake in the name of the person whose property had been assessed. The supreme court of Louisiana, interpreting the statutes of that state, otherwise decided. It was urged, however, that such decision was in conflict with many prior rulings of that court, and therefore a Federal question was presented. But it was held that as it was within the power of the state of Louisiana, without violating the Constitution of the United States, to direct the assessment without giving the name of the owner, by an adequate description of the property assessed, the decision of the supreme court of the state of Louisiana raised no Federal question. The court said (p. 683, L. Ed. p. 625, Sup. Ct. Rep. p. 233):

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Amendment and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor conterminous.

"The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of

such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question, within the final jurisdiction of the courts of last resort of the several states.

And the principle thus inculcated not only disposes of the argument which we have previously considered, but also makes it clear that the supreme court of Illinois decided a local, and not a Federal, question when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment, which had been set aside, was made. The theory lying at the foundation of all the arguments advanced to show that the court below committed error of a Federal nature is this, and nothing more, that the equal protection of the laws was denied by the supreme court of Illinois, because that court, although it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that, because it is considered that there was inconsistency in the reasoning by which the supreme court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided in the courts of last resort of the several states would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases. In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the supreme court of the state of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale of our jurisdiction, we have not even approached its consideration.

Judgment affirmed.

MARKLEY v. CITY OF CHICAGO

(*Supreme Court of Illinois, April 18, 1901.*)

[60 N. E. Rep. 512.]

Local Assessment—Judgment—Reversal.—One who had obtained a reversal, as to his property, of a judgment confirming an assessment for city improvements, could not complain of a judgment confirming a second assessment on the ground that the court rendering it acted without jurisdiction in setting aside the first.

Markley *v.* City of Chicago

Defective Assessment—Reassessment.— Under City and Village Act, art. 9, § 46, authorizing a new assessment where a former one had been set aside by any court, a new assessment for city improvements was proper, where a judgment confirming a special assessment for such improvements authorized by a valid ordinance was reversed because the commissioners named in the ordinance did not make the estimate of the cost of such improvements; the defect causing the annulment of the first assessment being amendable

Same—Same — Sufficiency.— Where city improvements were made under a valid ordinance properly specifying the nature, locality, and description of the improvements, and the first assessment therefor failed because the cost thereof was not estimated by the commissioners named in the ordinance, an assessment under a supplemental ordinance reciting that the improvements were completed in accordance with the original ordinance was not defective because the ordinance did not repeat the description of the improvements.

Same—Same—Effect of Statute on Pending Litigation.—Under Act 1897, § 99, providing that laws subsisting at the passage of the act should continue to apply to proceedings pending in any court when the act took effect, where proceedings for the confirmation of a special assessment for city improvements were pending at such time, and judgment of confirmation was reversed, and a new assessment for such improvements was levied after the act took effect, the new assessment was not governed by the provisions of such act prescribing an estimate of cost of local improvements by the city engineer, etc.

Same—Specifications — Sufficiency.— Specifications, in an ordinance authorizing city improvements, that the curbstones used should not be less than four feet long, three feet deep, and five inches thick, were sufficient.

Same—Same—Same — Objections.—Where city improvements had been completed when an assessment therefor was levied, an objection to the assessment on the ground that the authorizing ordinance requiring the curbstones to be firmly imbedded on flat stones failed to specify the size, kind, and quality of such flat stones would not be sustained.

Appeal from Cook county court; Robert H. Lovett, Judge.

Petition by the city of Chicago for the confirmation of a special assessment. From a judgment of confirmation, John Markley appeals. Affirmed.

Gardner & Burns (William J. Donlin, of counsel), for appellant.

Walter L. Fisher, Charles M. Walker, Corp. Counsel, and Armand F. Teefy, Special Assessment Atty., for appellee.

CARTWRIGHT, J. On December 22, 1897, we reversed a judgment of the county court of Cook county in favor of appellee, confirming a special assessment upon the property of appellant for curbing, grading, and paving Calumet avenue from Fifty-First street to Fifty-Fifth street, in the city of Chicago, because the estimate of the cost of said proposed improvement was not made by the same persons named in the ordinance as commissioners, and we thereupon remanded the cause to said court for such other and further proceedings as to law and justice should appertain. On February 5, 1898, appellant, after due notice to appellee, filed in said court our mandate reversing said judgment and remanding said cause. On November 20, 1899, the city council of appellee passed a supplemental ordinance, reciting the passage of the original

ordinance for the improvement, and setting out that the commissioners who were appointed by said ordinance did not make the assessment; that proceedings were commenced for the levy of an assessment, which was levied and confirmed; that a contract for the improvement was let, and the improvement was made and completed in all respects in accordance with the ordinance, and the work was accepted by appellee, and vouchers issued to pay for the same; and that the assessment was set aside, and the judgment confirming the same reversed, as to certain parties, by this court, for the reason that the estimate was not made according to law. The supplemental ordinance then provided that a new assessment for the cost of the improvement and the making and levying of the new assessment, but not including the cost of making and levying the former assessment, should be levied; that each lot assessed in said original proceeding should be credited with any payments made on the previous assessment; that the new assessment should be payable in one installment; and that three persons therein named as commissioners should make an estimate of the cost of the improvement as completed, and the cost of making and levying the new assessment. The commissioners so appointed reported that they investigated the improvement as actually made and completed, and the cost of making the same, and they reported an estimate thereof, with the cost of making and leving the new assessment. This report was approved, and the corporation counsel was ordered to file a supplemental petition in the county court for the new assessment. The supplemental petition was filed, setting out all the facts and the previous proceedings, together with the supplemental ordinance, estimate and order of approval, and on December 18, 1899, the court entered an order that the former assessment be annulled and set aside, and three persons were appointed to make a new assessment. Appellant appeared, and objected to the assessment. On the question of benefits a jury was waived, and the cause submitted to the court, and appellant offered no evidence on that question. His objections were overruled, and judgment of confirmation was entered, from which he prosecuted this appeal.

The first objection argued by appellant is that the order of the county court setting aside the first assessment is without jurisdiction and void, because it was made many terms after the judgment was entered. The appellant brought that judgment confirming the first assessment to this court for review, and we reversed it as to his property on errors assigned by him. The mandate of this court had been filed by him in the county court, and, so far as he was concerned, the judgment was already reversed and set aside. There was no final judgment of confirmation as to his property, and he is not concerned with the assessment as to the property of others who are not complaining of the judgment. Both the supplemental ordi-

nance and the petition recite that we had reversed the judgment as to the property of appellant and others upon writ of error. Appellant relies upon the decision in McChesney v. City of Chicago, 161 Ill. 110, 43 N. E. 702. That was an attempt to abandon a valid assessment after a judgment which had been affirmed by this court upon appeal, and to substitute another assessment for the same, or substantially the same, improvement. We said that section 46 of article 9 of the city and village act, providing for a new assessment where a former one has been annulled by the city council or board of trustees or set aside by any court, could not be applied to that judgment. In this case we reversed the judgment of confirmation, and remanded the cause to the county court for further proceedings. By the reversal the proceeding was brought within the provision of the statute. In such a case, if an improvement has been completed under an ordinance providing that the improvement shall be made, and that it shall be paid for by special assessment, a new assessment may be made to pay for the improvement completed under the former ordinance. If the ordinance under which the improvement was made is not a nullity, and the defect which caused the first assessment to be erroneous can be remedied or amended, the new assessment may be levied. City of East St. Louis v. Albrecht, 150 Ill. 506, 37 N. E. 934; Freeport St. Ry. Co. v. City of Freeport, 151 Ill. 451, 38 N. E. 137; Commissioners v. Farber, 171 Ill. 146, 49 N. E. 427; Murray v. City of Chicago, 175 Ill. 340, 51 N. E. 654. The judgment against the property of appellant was reversed because the persons named in the ordinance did not in fact make the estimate. That was a defect which could be remedied by the appointment of new commissioners and an estimate by them. Not only was appellee authorized to make the new assessment, but, the work having been completed by a contractor under the ordinance providing that he should be paid by special assessment, the appellee was bound to make a new assessment to pay for the improvement. Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N. E. 1085; Foster v. City of Alton, 173 Ill. 587, 51 N. E. 76. Appellee could be compelled to take the necessary steps to remedy the defect and to cause such an assessment to be levied. People v. City of Pontiac, 185 Ill. 437, 56 N. E. 1114.

Appellant's next point is that the supplemental ordinance does not specify the nature, character, locality, and description of the improvement. It recites that the improvement has been made and completed in accordance with the original ordinance, but does not repeat the description. The first assessment did not fail on account of a defective specification of the nature, character, locality, or description of the improvement. So far as anything was decided about the ordinance, it did not require amendment in matter of description, but it was a valid ordinance in full force, authorizing the

improvement to be made, and the judgment was reversed for want of a legal estimate under it. The improvement was made and accepted by appellee as in accordance with the ordinance, and it was unnecessary that the specifications should be repeated in the new ordinance. It is true that an assessment cannot be levied for work done when there was no ordinance authorizing the improvement, as in the case of City of Carlyle v. Clinton Co., 140 Ill. 512, 30 N. E. 782, where the city made an improvement without passing any ordinance, and, after it had been completed, passed an ordinance to pay for it by special assessment. But here there was an ordinance providing for the improvement before it was made.

It is next claimed that the new assessment, as levied and confirmed, is not authorized by statute because the proceeding is controlled by the act of 1897 concerning local improvements, and consequently there should have been a recommendation of the ordinance by the board of local improvements, an estimate of the cost by the city engineer, notices, and a public hearing under that act. Section 99 of the act of 1897 provides that the laws subsisting at the passage of the act shall continue to apply to proceedings pending in any court in this state when the act took effect. This case falls within that provision. The proceeding was pending here on appellant's writ of error when the act took effect, and after the reversal and filing of the mandate it was pending in the county court for such further proceedings as were authorized by law. The proceeding for the new assessment is authorized and governed by section 46 of article 9 of the city and village act, providing for a new assessment where any assessment has been annulled by the city council or board of trustees or set aside by any court, as said section existed at the time the law of 1897 took effect.

Appellant also seeks to raise objections to the original ordinance in matters of description of the improvement which was then in contemplation, but which has since been completed and accepted by appellee as in compliance with the ordinance. The first of these objections is that the length, depth, and thickness of the curbstone are left to the determination of the superintendent, and that the specification is not sufficient. The provision is that the curbstone shall not be less than four feet long, three feet deep, and five inches in thickness. The minimum size which the contractor must furnish is fixed, and nothing is left to the superintendent in that respect, but the contractor might, of course, furnish longer, deeper, and thicker stone if he saw fit. The description is sufficient for the purpose of both the estimate and the contract. The other objection is that the curbstones are to be firmly imbedded upon flat stones, the size, quality, and kind of which are not given. Where the work has not been done when the assessment is levied, such assessment must be based upon an estimate, and, it is essential to the protection of the property owner that

such estimate should be, as near as possible, what the actual cost will be. The purpose of the requirement that the ordinance shall specify the nature, character, locality, and description of the improvement, as we have often said, is to enable commissioners to make an intelligent estimate of the cost. In such cases we have enforced that provision strictly for the protection of the property owner, and have required much particularity in the description, to the end that property owners shall not be called upon to pay the amount of an estimate based on loose and uncertain description. We have held in a number of cases that the failure to specify the size and kind of flat stones to be used in a proposed new improvement is sufficient to defeat a confirmation. In such a case, the failure of a complete specification renders it uncertain what kind or size of stones has been estimated, or what kind or size will be actually furnished in making the improvement. In this case we did not hold the ordinance insufficient, and our judgment of reversal did not relieve appellant or his property from paying his share of the cost of improvement to the extent that his property was benefited. There may be cases where it is essential that the original ordinance should be amended in matters of description, even after the work is completed; but, if that is so as to some important and material part of the improvement, we do not see how it would benefit appellant to have these stones now particularly described by way of amendment. The improvement has actually been made, and the exact kind and size of the flat stones have been determined by the improvement actually in place. It would not tend to the protection of appellant or any other property owner by requiring the amendment of the original ordinance in a minor matter of detail, such as setting out the kind or size of the flat stones. The only defect for which the judgment was reversed was remedied by the supplemental ordinance and the estimate made under it.

The court did not err in confirming the new assessment, and the judgment is affirmed. Judgment affirmed.

NICHOLS *v.* CITY OF SUPERIOR.

(*Supreme Court of Wisconsin, March 19, 1901.*)

[85 N. W. Rep. 428.]

Pleading—Bills of Exceptions—Exceptions Must Be Incorporated in Bill.—Rev. St. 1898, § 2870, provides that either party to an action may except to any finding of facts by filing written exceptions with the clerk at any time before the expiration of 10 days after service on such party of a written notice of the entry of judgment, and that all such exceptions may be incorporated in the bill of exceptions. *Held*, that where a paper purporting to contain exceptions to findings of fact was filed with the clerk and returned with the record, but was not incorporated in the bill of exceptions, or identified in any manner, the exceptions would not be reviewed on appeal.

Nichols *v.* City of Superior

Assignment of Claims—Notice—Set-Off.*—Contractors agreed to build a sewer for the defendant for a certain sum, payments to be made on estimates as the work progressed. The work was to be completed at specified dates, and liquidated damages were to be paid in case of noncompletion within the time specified. The board of public works reserved the right, in case the work was not prosecuted with diligence, to relet the contract to other parties, or to complete it at the cost of the contractors. After prosecuting the work for a time, and receiving certain payments on estimates, the contractors abandoned the work while certain sums were still owing them, and assigned their claims to plaintiff, but no notice was given of such assignment to the defendant until after the board of public works had completed the sewer at a necessarily greater cost than the contract prices. *Held*, that such facts supported a judgment for defendant in an action by the assignee to recover the amount of the assigned claims.

Appeal from circuit court, Douglas county; A. J. Vinje, Judge.

Action by L. A. Nichols, assignee of the Bank of West Superior, against the city of Superior. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This action was brought to recover about $17,000 for labor performed and materials furnished by the firm of Forrestal Bros. in the construction of certain sewers and city improvements in the city of Superior, under the terms of several contracts with the city, the claims having been assigned by Forrestal Bros. to the Bank of West Superior, of which bank the plaintiff is the assignee under a voluntary assignment. A counterclaim for damages for not completing the work was interposed by the city. The case was tried by the court, and findings of fact made in substance as follows: (1) That in the year 1890 the firm of Forrestal Bros. made five separate contracts with the city of Superior, known as Nos. 19, 30, 33, 34, and 38, respectively, for the construction of certain city improvements in said city at certain prices. (2) That each of said contracts contained a provision to the effect that, if the work was not prosecuted with diligence, the board of public works of the city might suspend the same, and relet the work to some other competent party, or employ men and buy material for the completion of the same, and charge the cost thereof to the contractors; and also provided that, in case of the noncompletion of the work on a certain time fixed in the contract, the contractors should pay to the city certain sums per day as liquidated damages. (3) That payments upon the contracts were to be made upon periodical estimates, reserving, however, 25 per cent. until the final completion of the work, and that no claims for additional work beyond the contract price should be allowed unless ordered in writing by the city engineer. (4) That, as to contract No. 19, the contractors performed work thereunder amounting to $16,367, and the city paid to them thereon $15,548.65, and afterwards paid the sum of $92.25 in completing the work as left by the

*See notes at end of case.

contractors; that the city engineer issued an estimate for extra work in the amount of $1,881.15, but that the said work was not directed in writing. (5) That, as to contract No. 30, the contractors performed work thereunder amounting to $11,205, and the city paid thereon the sum of $4,383.19, and thereafter necessarily expended in completing the work the sum of $19,878.12; the entire sum thus paid by the city being $5,982.69 less than the contract price. (6) That, as to contract No. 33, the contractors performed work thereunder amounting to $13,077.40, and were paid $6,938.03, and the city thereafter necessarily expended in completing the work $22,823.99; making the total paid out by the city $29,762.02, or $29.63 less than the contract price. (7) That, as to contract No. 34, the contractors performed work amounting to $8,276.66, and were paid $3,161.18, and the city thereafter expended in completing said work $34,333.56; making $8,924.64 paid out by the city more than the contract price. (8) That, as to contract No. 38, the contractors were paid $267.75 for labor performed by them, and that the city afterwards completed said contract, and necessarily expended $39,884.64 in so doing, and that the total amount paid out by the city was $3,082.38 more than the contract price. (9) That on the 24th of September, 1890, the Forrestal Brothers assigned by instrument in writing all their credits of every nature and assets in the county of Douglas, Wis., to the Bank of West Superior, and gave said bank an order upon the comptroller of the city for all money due or to become due them upon said contract, but that the board of public works of the city never consented, in writing or otherwise, to said assignment. (10) That the Bank of West Superior made no claim, and did not inform the city of the fact that it had any claim, against it until September 12, 1896. (11) That on the 25th of September, 1890, the Forrestal Brothers abandoned all of their said contracts, without fault on the part of the city, and that the city then went on and completed the same. (12) That the liquidated damages for failure to complete said contracts within the time stipulated therein amounted to $3,350, no part of which has been paid. (13) That the aggregate amount expended by the city in completing said contracts over and above the contract price, together with the liquidated damages aforesaid, is $15,449.27, and that the said sum is a proper offset against the amounts due the contractors for work actually done, and exceeds such amount. Upon these findings, judgment was ordered dismissing the complaint. A paper is returned with the record purporting to contain exceptions by the plaintiff to certain of the findings, but the same are not incorporated in the bill of exceptions. Judgment was rendered for the defendant, and the plaintiff appeals.

George P. Knowles, for appellant.
Archibald McKay and Geo. B. Hundnall, for respondent.

Nichols *v.* City of Superior

WINSLOW, J. (after stating the facts). In order to entitle this court to review findings of fact of the trial court, it is absolutely essential that exceptions thereto be incorporated in the bill of exceptions. This proposition has been so frequently announced that it seems like an affectation of learning to cite authorities. Rev. St. 1898, § 2870; Cramer v. Hanaford, 53 Wis. 85, 10 N. W. 15; Lederer v. Kohn's Estate, 100 Wis. 662, 76 N. W. 604. Nor will a paper purporting to contain exceptions filed with the clerk, and returned with the record, but not incorporated in the bill, answer the purpose. Newton v. Williams, 94 Wis. 222, 68 N. W. 990. In the present case there is such a paper returned with the record, but it is not inserted in the bill, nor was it identified in any manner so that it can be said to have been incorporated therein. The only reference contained in the bill to any exceptions to the findings is the following recital immediately preceding the certificate: "The court thereupon filed its findings and conclusions of law, to which findings and conclusions of law the plaintiff has filed his several exceptions, which are made part of the record, and rendered judgment in favor of the defendant for its costs and disbursements." This recital is plainly insufficient. It does not purport to make such exceptions part of the bill, nor does it even attach or describe them so that they can be with any certainty identified. The only question presented, therefore, is whether the pleading and findings sustained the judgment. It cannot be doubted that they do sustain it. The Forrestals contracted to construct certain city improvements for certain sums, payments to be made on estimates as the work progressed; the work to be completed at specified dates, liquidated damages at so much per day to be paid in case of noncompletion at the specified time; the board of public works having the right, in case the work was not prosecuted with diligence, to relet the same to other parties, or employ men and purchase material, and complete the same, and charge the cost to the contractors. Atfer prosecuting the work for a time, and receiving certain payments on estimates, they abandoned their contracts, certain sums being still owing them for work actually done. The board of public works completed the work partly by men in their employ and partly by contract, and in so doing necessarily expended certain sums in excess of the contract prices, the aggregate of which sums was greater than the sums still due the Forrestals for the work actually done by them. Under the contract these sums, as well as the amounts of liquidated damages for the noncompletion of the work in the stipulated time were proper offsets to the claims of the Forrestals. Soon after the abandonment of the work, the Forrestals assigned their claims against the city to the Bank of West Superior, but no notice of such assignment was given to the city until September, 1896, when its offsets had accrued. These facts are not open to dispute,

and they demonstrate the correctness of the judgment. Judgment affirmed.

NOTES.

Municipal Corporations—Recoupment—Set-Off.—The doctrines of recoupment and set-off as applied to municipal corporations are, in the main, the same as when applied to actions between individuals, though there has crept into the books some confusion in regard to the whole subject owing to the failure at times to note the difference in principle and practice between common-law recoupment and statutory set-off. Unless some reason based on public policy intervenes, as when a plea of set-off is attempted to be set up against a demand for taxes, the defence of set-off is as available in an action instituted by a city as in an action brought by an individual; in fact, a debtor may buy up a city obligation, where statute permits, for the very purpose of using it as a set-off. Thus it is laid down by the United States Supreme Court that, "the legal and equitable right in a general way of a debtor to procure the obligations of his creditor and use them as a set-off for his own debt will hardly be denied when the law of the state authorizes it, and such law can be liable to no impeachment as divesting vested rights or impairing the obligation of contracts." Amy *v.* Taxing Dist. of Shelby County, 114 U. S. Rep. 387. And see also, Blount *v.* Windley, 95 U. S. Rep. 173. But unless authorized by charter or statute a city has no authority to buy up a judgment against a municipal creditor for the purpose of using it as a set-off. Early's Appeal, 103 Pa. St. 273. A case which is similar in every respect with the principal case is that of Taylor *v.* Mayor, etc., of New York, 82 N. Y. 10. There certain contractors held a claim against the city of New York for work and labor done and materials furnished. This claim was assigned to one T., who afterwards dying, an action was brought thereon by his personal representative. The city sought to cut down the amount sued for by showing that through the fraud and collusion of its officials with the contractors it had been led to make large overpayments to the latter for work done and materials furnished on a former occasion. It was held to be a perfectly proper plea, and the city not being estopped in any way as against the assignee, the set-off was allowed.

The principle which at common law forbids any attempt to coerce the sovereign by suit brought against it, also forbids the allowing of a set-off against it in any action instituted by it. But this principle does not apply to a political division of the state, such as a county. Taylor *v.* Mayor, etc., of New York, 82 N. Y. 10.

Set-Off Not Allowed against Demand for Taxes.—In regard to taxes, it is the universal doctrine that in the absence of statutory provisions, no recoupment, counterclaim, or set-off can be set up against a demand therefor. As to set-off, some courts have placed this on the technical ground that only a debt is liable to and can be the subject of set-off, a tax being neither a debt nor the subject of set-off. Camden *v.* Allen, 26 N. J. L. 398. But undoubtedly the real reason, as given by most courts, is, that on grounds of public policy, and making every reasonable intendment in favor of the sovereign, taxes owing the corporation or state are put on a different and higher plane from mere contract obligations between individuals. Thus, in a well-considered case, it is said: "The amount which the citizen pays to the government through taxation is not regarded as the settlement of a simple contract or matter of indebtedness, capable of being accurately estimated in value in the same manner as an ordinary indebtedness existing between individuals. A public use, a public benefit, to all and to each, is one of the essential ends sought to be attained through such taxation. The public good, through the instrumentality of local municipal governments, exercising political, governmental, and civil powers and functions, is the object sought to be obtained, and the power of taxation is an essential means given to reach this end. A court of equity should not assume such powers as would, in any event, embarrass the attainment of these ends by

the corporation. To enjoin the collection of municipal taxes due upon property owned by individuals to the extent that there is a debt from the city to such individuals, is the exercise of a power of appropriation and interference with public trusts and the exercise of delegated sovereign powers which have not received the sanction of any court..... In the matter of municipal revenues and taxes, the rule at law is that they are exempt from execution, unless by statute they are made so liable. The same principle which exempts them at law would not permit a court of equity to allow a creditor to set off his debt against his taxes." Finnegan *v.* City of Fernandina, 15 Fla. 379, 21 Am. Rep. 292. That taxes are not debts and cannot be the subject of set-off, see Battle *v.* Thompson, 65 N. Car. 46; Cobb *v.* Corporation of Elizabeth City, 75 N. Car. 1; Gatling *v.* Com'rs of Carteret, 53 Am. Rep. 432: Pittsburg *v.* McKnight, 91 Pa. St. 202; Brientnall *v.* Philadelphia, 103 Pa. St. 156; Pierce *v.* Boston, 3 Met. 520; Charleston *v.* Oliver, 16 S. Car. 47; Apperson *v.* Memphis, 2 Flip. (U. S.) 363: Scobey *v.* Decatur Co., 72 Ind. 551; Newport, etc., Bridge Company *v.* Douglass, 12 Bush (Ky.) 673; New Orleans *v.* Davidson, 30 La. Ann. 541, 31 Am. Rep. 228; Union Co. *v.* Bordelon, 7 La. Ann. 192. See also, McCracken *v.* Elder, 34 Pa. St. 239. As to counterclaim, see Philadelphia *v.* Cloud, 4 Wkly. N. Cas. 445.

But where city obligations are receivable for taxes, they and the taxes may be the subject of set-off. Amy *v.* Shelby County Taxing Dist., 114 U. S. Rep. 387. And it has been held that a set-off was admissible in an action of debt on bond for a penalty, although the bond had been given to secure the collection and payment of public taxes. Concord *v.* Pillsbury, 33 N. H. 310.

Assessments for Local Improvements—Set-Off—Counterclaim—Recoupment.—The owner of property assessed for special benefits can set up no independent claim as an offset in such case, but he may defend the assessment on the ground that he was not benefited to the extent that he is sought to be assessed, or he may set up the fact that the materials used were inferior in quality, or that the work was improperly done. And when sued by the city on such assessment he can lay no claim to have equities between himself and the contractor adjusted. Pittsburg *v.* McKnight, 91 Pa. St. 202; Brientnall *v.* Philadelphia, 103 Pa. St. 156. And even where the suit to collect such assessments is brought by the contractor under authority given him for that purpose it cannot be the subject of set-off. Himmelmann *v.* Spanagel, 39 Cal. 389; Himmelman *v.* Cofran, 36 Cal. 411; Menser *v.* Risdon, 36 Cal. 239; Emery *v.* San Francisco Gas Co., 28 Cal. 345; Burlington *v.* Palmer, 67 Iowa 681. And see Lohrun *v.* Eyermann, 5 Mo. App. 481; Hoffmire *v.* Rice, 22 Kan. 749; Nebraska City *v.* Nebraska Gas, etc., Co., 9 Neb. 339. A defence good against the city is good against the contractor. St. Louis *v.* Clemens, 36 Mo. 469. In Pennsylvania, where by the laws and ordinances the contractor receives the assessment bills in payment from the city, and it turns out that his work is so defectively done as to be worthless, it is held that he has no just right to recover against the property owner, and the latter is not precluded from the defence because he is not a nominal party to the contract. Pepper *v.* City of Philadelphia (Pa.), 6 Atl. Rep. 899; City of Erie *v.* Butler, 120 Pa. St. 374, 14 Atl. Rep. 153. The corporate authorities cannot dispense with faithful performance on the part of the contractors. Bond *v.* Newark, 19 N. J. Eq. 376; Leibstein *v.* Newark, 24 N. J. Eq. 200; Schumm *v.* Seymore, 24 N. J. Eq. 143; St. Louis *v.* Clemens, 36 Mo. 467; Saxton *v.* Beach, 50 Mo. 488. But see Murray *v.* Tucker, 10 Bush (Ky.) 240. In a suit on a special tax bill the defendant can set off a debt due him from the owner of the bill. Kansas *v.* Ridenour, 84 Mo. 253.

Set-Off by and against Corporate Officials.—Where a city official, whose duty it is to collect certain of the city revenues, to wit, wharf and levee dues, and deposit them in the city treasury, is sued for a balance which he has failed to deposit, he cannot claim an offset for the amount which the city owes him on salary. City of New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569, distinguishing U. S. *v.*

McDaniel, 7 Peters 16; U. S. *v.* Ripley, 7 Peters 23; U. S. *v.* Fillebrown, 7 Peters 28; U. S. *v.* Ringgold, 8 Peters 163.

A debt due to an officer in his private capacity is not a proper set-off to a claim against him for money received by him in his official capacity. Prewett *v.* Marsh, 1 Stewart & Porter (Ala.) 17, 21 Am. Dec. 645; Harper *v.* Howard, 3 Ala. 284; Com. *v.* Rodes, T. B. Mon. (Ky.) 318. And see Com'rs of Yancy *v.* Peircy, 72 N. Car. 181; U. S. *v.* Prentice, 6 McLean (U. S.) 65. Some of these were suits against constables and justices of the peace, but the same principles are applicable to city officials.

In a suit upon a note given by the committee of a school district for the erection of a school house, damages sustained by the district, by a failure to perform the contract, cannot be set off against the note, where they are held personally liable thereon. Bayliss *v.* Pearson, 15 Iowa 279.

But where the official bond given to a town by a collector of taxes and his sureties is several as well as joint, and the collector brings an action against the town on a demand which is itself the subject of set-off, the defendants may set off their claim on such bond for money which the plaintiff received on tax bills committed to him for collection, and which he has not accounted for nor paid over. Donelson *v.* Colerain, 4 Met. (Mass.) 430.

Same—Burden of Proof.—When the public alleges a set-off against an officer, the burden rests with the public to establish it. Jones *v.* United States, 39 Fed. Rep. 410. Thus where it was alleged that the clerk retiring from office had forfeited his fees by failing to file an explicit fee bill within the term prescribed by statute, it was held that the allegation, although of a negative character, must be proved. Barrow *v.* Robichaux, 14 La. Ann. 203.

GAGE *v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, June 19, 1901.*)

[60 N. E. Rep. 896.]

Special Assessments—City Ordinance—Validity.—An ordinance for the construction of connected sewers on certain streets between the sewer connections on certain other streets was void for uncertainty, where one of the sewers designated as the starting point did not exist, no provision for its construction being contained in the ordinance.

Same—Same—Same.—An ordinance for the construction of certain sewers, which failed to provide for the necessary connections on one of the streets for the outflow, was void, since the city has no right to empty sewage on private property.

Same—Same—Same.—An ordinance ordering the construction of certain sewers with house-connection slants opposite each 20 feet of lot frontage was void, where some of the lots on the street had more than 20 feet frontage.

Error to Cook county court; Frank Scales, Judge.

Proceedings by the city of Chicago for a special assessment for the construction of certain sewers, to which Henry H. Gage, an abutting property owner, objected. From a judgment confirming the assessment, the defendant brings error. Reversed.

This is a special assessment proceeding to pay the cost of a connected system of sewers in the city of Chicago. The

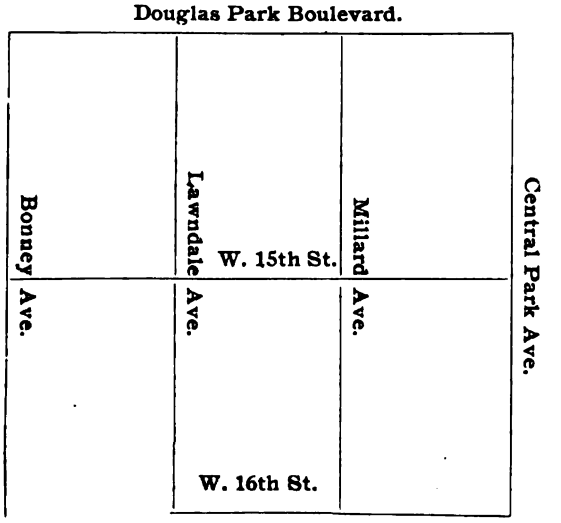
ordinance providing for such connected system of sewers was passed by the city council on November 2, 1891. Petition was filed in the county court of Cook county on November 25, 1891, to which was attached a certified copy of the ordinance, alleging that the commissioners appointed by the common council to make an estimate of the cost of the improvement contemplated by the ordinance theretofore, on November 9, 1891, made a report to the council (which was afterwards approved by it), estimating the cost at $14,406.65; the copy of the report being annexed to the petition, and made a part thereof. The petition prayed for an assessment of the cost of the improvement in the manner prescribed by law. An order was made by the court on November 25, 1891, appointing commissioners to make the assessment. The assessment roll was filed on January 28, 1892. On February 8, 1892, the plaintiff in error entered his appearance, and filed his objections to the confirmation of the special assessment. On May 27, 1892, hearing upon the objections of the plaintiff in error was passed, and it was ordered that the cause proceed, and a jury come. On May 28, 1892, the jury returned their verdict, finding the issues for the petitioner, the city of Chicago, and that the property of the objector was not assessed more or less than it would be benefited by the improvement, nor more or less than its proportionate share of the cost of the improvement. On June 1, 1892, the cause came on to be heard on the assessment roll and the objections thereto, and by agreement a trial by jury was waived, and the cause was submitted to the court for trial without a jury, and the court overruled said objections, and thereupon, on motion of the attorney of the city of Chicago, it was ordered and adjudged by the court that said assessment and all proceedings therein be, and the same were thereby, confirmed, and that the clerk of the court certify the same, together with the judgment, to the city collector, as required by law. Afterwards, on March 28, 1899, a judgment was entered by the court, by the terms of which, after reciting that no judgment had ever been entered upon said verdict, it was, upon motion of the petitioner, further adjudged and decreed that judgment of confirmation be, and was thereby, entered upon said verdict, confirming said assessment roll as to all such objections; and it was further thereby ordered that the clerk of the court certify the judgment to the city collector for collection according to law. The present writ of error is sued out for the purpose of reviewing the said judgment.

F. W. Becker, for plaintiff in error.

Charles M. Walker, Corp. Counsel, and Robert Redfield, Asst. Corp. Counsel, and William M. Pindell, Asst. Corp. Counsel, for defendant in error.

MAGRUDER, J. (after stating the facts). Among the objections made to the confirmation of the assessment by the

plaintiff in error in the county court was the objection that the ordinance lying at the basis of the assessment was void for uncertainty. The following diagram shows the situation and aspect of the proposed sewers, and the streets through which they were to run:



By the terms of section 1 of the ordinance it was ordained: "That a connected system of vitrified tile pipe sewers be constructed as follows, to wit: In West Sixteenth street, along the center line thereof, from and connecting with the sewer in Central Park avenue to the west line of Lawndale avenue; in West Fifteenth street, along the center line thereof, from and connecting with the sewer in Central Park avenue to the west line of Bonney avenue; in Douglas Park boulevard, along a line thirty feet north of and parallel with the south line thereof, from and connecting with the sewer in Central Park avenue to the center line of Bonney avenue; and in Millard avenue, Lawndale avenue, and Bonney avenue, along the center line thereof, from their connections with said sewer in West Sixteenth street to their connection with said sewer in West Fifteenth street, and thence to their connection with said sewer in the south side of Douglas Park boulevard." The streets running north and south are Central Park, Millard, Lawndale, and Bonney avenues, and the streets running east and west are Douglas Park boulevard, West Fifteenth, and West Sixteenth streets. The sewer in West Sixteenth street is, by the terms of the ordinance, to run west to Lawndale avenue only, while the sewers in West Fifteenth street and Douglas Park boulevard run west to Bonney avenue, which is a block further west than Lawndale avenue. As the West Sixteenth street sewer runs only to Lawndale avenue, it is apparent that between Lawndale and

Bonney avenues there is a hiatus, and no sewer; hence a sewer in Bonney avenue could not connect with the sewer in West Sixteenth street. The reference in the ordinance could not be to any existing sewer in West Sixteenth street between Lawndale and Bonney avenues, nor to any sewer to be thereafter constructed in West Sixteenth street between Lawndale and Bonney avenues, because the ordinance specifies that the sewers shall be constructed in Millard, Lawndale, and Bonney avenues, along the center line thereof, "from their connections with said sewer in West Sixteenth street." The words "said sewer" can refer to nothing else than the provision theretofore made in the ordinance for a sewer in West Sixteenth street from Central Park avenue to Lawndale avenue. Therefore the sewer referred to in the ordinance is only the sewer extending in West Sixteenth street from Central Park avenue to Lawndale avenue, and not any sewer in West Sixteenth street extending from Lawndale avenue to Bonney avenue. It follows that the sewer in Bonney avenue could not connect with the sewer in West Sixteenth street. In view of this uncertainty, we are of the opinion that the ordinance was void. City of Alton v. Middleton's Heirs, 158 Ill. 442, 41 N. E. 926. As the Bonney avenue sewer has no connection with the West Sixteenth street sewer, its point of commencement in West Sixteenth street is not designated. Its starting point being an unknown quantity, neither its length nor depth can be known, and no intelligent bid could be made for that part of the work. As the sewer running south in Bonney avenue would have no connection with any sewer in West Sixteenth street, its outflow would make a cesspool of private property. The city would have no right to empty the sewage upon private property. Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec. 392. The ordinance makes no provision for the outflow.

In addition to what is said above, the ordinance provides for "house-connection slants of six-inch internal diameter to be placed on both sides of the sewer opposite each twenty feet of lot frontage." It sufficiently appears from the assessment roll that the lots of the plaintiff in error have a frontage of about 50 feet; certainly of more than 20 feet. The arbitrary subdivision of such lots into subdivisions of 20-foot lots necessarily increases the expense of the improvement, and casts a burden upon the property in excess of the benefit received, and is beyond the power of the council. We have held in a number of cases that the city has no power to dictate to a landowner how he shall subdivide his land; and lots of a greater frontage than 20 feet cannot be subdivided by the city into lots, each having a frontage of 20 feet, for the purpose of being assessed. Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096, and cases therein referred to.

For the reasons above stated, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

WHITE *v.* KNOWLTON *et al.*

(Supreme Court of Minnesota, July 5, 1901.)

[86 N. W. Rep. 755.]

State Tax—Lien—Special Assessment—Priority.—Sections 34, 47, subc. 7, c. 7, Sp. Laws 1887, relating to special assessments for local improvements in the city of St. Paul, construed, and *held*: The lien of such an assessment is subordinate to the lien of the state for all taxes which have been or may be levied upon the same property under the general laws of the state, without reference to the time when the state lien accrued.
(Syllabus by the Court.)

Appeal from district court, Ramsey county; Olin B. Lewis, Judge.

Action by William G. White against Dexter A. Knowlton and Charles D. Knowlton. Findings for plaintiff. From an order denying a new trial, defendants appeal. Affirmed.

Henry B. Farwell, for appellants.
William G. White, for respondent.

START, C. J. Action to determine adverse claim to a certain lot in the city of St. Paul. The plaintiff asserts title thereto by virtue of a tax sale thereof by the state based upon a judgment for the delinquent taxes of the year 1893. The defendants claim title to the lot by virtue of a sale thereof by the city of St. Paul upon a judgment on a local assessment for the cost of sprinkling the street in front of the lot during the season of 1894. The judgment and sale in each case was valid, and no redemption was ever made in either case, although due notice of the expiration of the time for redemption was given in each case. The trial court found that the plaintiff was the owner of the lot, that the defendants had no title thereto or lien thereon, and ordered judgment accordingly. The defendants appealed from an order denying their motion for a new trial. The record presents for our decision the sole question as to which party holds the paramount title. The lien of the state for the general taxes on the lot under which the plaintiff claims attached as of May 1, 1893, while the lien of the city for the local assessment under which the defendants claim attached February 14, 1895. Judgment was entered for the state taxes March 21, 1895, and the lot sold by virtue thereof on May 5, 1895. Judgment for the local assessment was entered on June 29, 1895, and the lot sold by virtue thereof on November 4, 1895. The general rule as to priority of tax liens is the reverse of the rule in ordinary cases, and the tax lien last in time is the first in right. Whether the general rule would apply in any case to the lien of the state for general taxes, as against a subsequent lien in favor of a city for local assessments, we need not discuss or decide, for this particular case is controlled by the charter provisions of the city of St. Paul. The city is given ample power by its charter to

levy and enforce local assessments, which are made a paramount lien on the real estate on which the same may be imposed from the date of the warrant issued for the collection thereof, subject, however, to the lien of the state for all taxes which have been or may be levied upon such property under the general laws of the state. Sp. Laws 1887, c. 7, subc. 7, §§ 34, 47. The specific language of such exception is this: "Provided that nothing in this act contained shall be construed to affect or prejudice the lien of the state for all taxes which have been or may be levied upon such property under the general laws of the state." The purpose of this proviso lies so clearly upon its face that no question of construction can arise. Its meaning is just what the words used import: that is, that the lien for a local assessment is subordinate to the lien of the state for taxes levied under the general laws of the state, without reference to the time when the lien of the state accrues. It follows that the lien which is the basis of the plaintiff's title was paramount to the lien under which the defendants claim, and that the plaintiff, and not the defendants, own the lot in question, by virtue of a sale thereof on such paramount lien. The record suggests other interesting and complicated questions, but it is our duty to decide this particular case, and leave other questions to be solved when they arise, if ever they do. Order affirmed.

SHURTLEFF *v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, June 19, 1901.*)

[60 N. E. Rep. 870.]

Street Improvements—Assessment of Benefits—Deduction for Lands Donated.—Local Improvement Act 1897, § 17, provides that, where part of the land "to be laid out into a street" has been donated by any person, it shall be lawful for the commissioners, in making the assessment for benefits, to appraise the land so donated, and apply the value thereof as an offset to the benefits assessed against such person. In 1891 plaintiff dedicated a strip of land for the extension of a street in defendant city. In 1899 defendant instituted proceedings to lay out and open a portion of such street lying several blocks east of the land dedicated by plaintiff, which constituted another part thereof. *Held*, that plaintiff was not entitled to have deducted from his assessment for benefits the value of the land dedicated by him in 1891, since the statute only contemplates a deduction for land donated "to be laid out into the street" for the opening of which benefits are assessed.

Same—Same—Ingress and Egress.—That plaintiff's lot does not abut on a proposed street, and that ingress and egress to and from it will not be affected by the opening thereof, is no objection to an assessment of benefits against it.

Same—Same—Hearing—Judgment.—Local Improvement Act 1897, § 26, provides that, on return of the verdict of the jury in proceedings to assess benefits of street improvements, the court shall enter such judgment thereon as the nature of the case may require, but that "no final judgment shall be entered until all the issues in the case have been disposed of." Objections were filed by plaintiff to a special assessment for the opening of a street, and the question of benefits was submitted to a

Shurtleff *v.* City of Chicago

jury. *Held*, that on the return of a verdict against plaintiff the court did not err in entering final judgment thereon before disposing of the objections filed by other property owners, since the statutory provision relates only to the final determination of the condemnation and assessment after all the issues between the different parties shall be settled under the other provisions of the act.

Appeal from county court, Cook county; Russell P. Goodwin, Judge.

Proceedings by the city of Chicago to lay out and open Oakdale avenue, in which commissioners were appointed to report the compensation to be paid the owners of private property to be taken or damaged. Plaintiff, Benjamin Shurtleff, appeared and filed objections to the commissioners' report. From a judgment on a verdict in favor of defendant, plaintiff appeals. Affirmed.

D. G. Robertson and Cyrus Heren, for appellant.

Charles M. Walker, Corp. Counsel, Robert Redfield, Asst. Corp. Counsel, and William M. Pindell, Asst. Corp. Counsel, for appellee.

CARTWRIGHT, J. The city of Chicago, appellee, instituted this proceeding in the county court of Cook county to lay out and open Oakdale avenue from Burling street to North Clark street, in said city. Commissioners were appointed to ascertain and report the just compensation to be paid to the owners of private property to be taken or damaged for the street, and also what real estate would be benefited by the improvement, and the amount of such benefits; and they made their report of such compensation, and gave a description of property which, in their judgment, would be specially benefited by the improvement, with the amount of benefit to each lot, tract, or parcel of land. Benjamin Shurtleff, appellant, being the owner of lots assessed for such benefits, appeared and filed objections, among which were the following: That the improvement was a private and local one, of no general public benefit, and that he had before that time donated for said Oakdale avenue a strip of land of the value of $15,000, largely in excess of said assessment; and the commissioners failed to appraise the value of the land so donated, or to apply such value as a set-off against the benefits assessed. There was a hearing of said objections before the court, and they were overruled. Thereafter the case came on for hearing on the question of benefits before a jury, which returned a verdict against appellant. The court rendered judgment on the verdict, and this appeal followed.

Appellant's property is located west of that portion of Oakdale avenue to be opened, and there are intervening streets, so that it is not dependent upon said portion for ingress or egress. There are streets running north and south on both sides of said property, and intersecting east and west streets, so that appellant has full access from his property to the gen-

eral system of streets in the city without opening the proposed avenue. The plan to lay out and open Oakdale avenue from Burling street to North Clark street by this proceeding was originated in 1899, and appellant proved on the hearing before the court that in 1891 he dedicated a strip of land between Sheffield avenue and Mildred avenue for an extension of Oakdale avenue between said streets, that the value of the land dedicated was from $5,000 to $8,000, and that the land so dedicated was accepted by the city, and forms that portion of Oakdale avenue between said Sheffield avenue and Mildred avenue. The land so dedicated was several blocks west of the place where it was proposed to open the avenue, and constituted another part of such avenue. On the trial before the jury the same fact of the previous dedication for a part of the avenue in another place was proved, and appellant asked the court to instruct the jury that, in making up their verdict, they should ascertain what land had been so donated by appellant for the street, and appraise the value thereof, and apply it as a set-off against the benefits assessed against his property. The court refused to so instruct.

Appellant claims a right to a credit for the value of the property donated by him eight years before, against the amount of his assessment, under section 17 of the act of 1897 concerning local improvements, which governs the proceeding. That section provides that, where part of the land to be laid out into the street has been donated by any person, it shall be lawful for the commissioners, in making the assessment, to appraise the value of the land so donated, and apply such value as a set-off to the benefits assessed against the person making the donation. The facts do not bring appellant's claim within the terms of the statute, which is intended to allow what a party gives towards a contemplated improvement in the way of land to be taken and used in opening a street, as against benefits to his remaining property. The statute only embraces land to be laid out into the street for the opening of which benefits are assessed, and it is not contended that any part of appellant's property was to be laid out into the proposed street. His dedication was made in 1891, for reasons or upon considerations which were satisfactory to him at the time, and for another part of the street, several blocks away, and such dedication of property lying elsewhere is not covered by the statute.

Appellant's property does not abut upon the proposed street, and the ingress and egress to and from the property will not be affected by opening it; and the next proposition argued is that, under such circumstances, benefits cannot be assessed. Appellant's counsel say that if Oakdale avenue were open at the place in question, and should be closed by the city, appellant could recover no damages for the injury to his property, because the damage would be general, and not special, differing in degree, but not in kind, from the damage to the gen-

eral public, and that special benefits must be determined upon the same basis. They insist that, if appellant could not recover damages for vacating the street after it shall be opened, his property cannot be chargeable with benefits resulting from such opening. The argument ignores the essential distinction between the taking of private property for public use and the imposition of a burden under the power of taxation. It is true that the owner of property cannot recover damages for the vacation of a public street not adjoining or contiguous to such property, and where the vacation does not deprive the owner of access to or egress from the property, because such vacation is not a taking or damaging of his private property for the public use. The power of taxation is a power to enforce contribution from persons and property for the maintenance of the government. General taxes are levied on the ground of general public benefits, while special assessment is a peculiar species of taxation to pay for local improvements, which recognizes the general public interest and benefit, but rests upon the supposition that a portion of such public are specially benefited in the increase of value to their property. The principle upon which special assessments rest is that, while the benefit does not differ in kind from the benefit to the rest of the community, it differs in the fact that the particular property assessed is enhanced in value by the improvement to the amount of the assessment. A local improvement may specially benefit a portion of the community so as to justify an assessment equal to such increase in value. The act of 1897 contemplates that an improvement may be a general and public benefit, as well as a special benefit to particular property; and by section 15 the commissioners are required to estimate and report what proportion of the improvement will be a benefit to the public, and to apportion the benefits between the municipality and the property assessed. The commissioners and the jury found that appellant's property was benefited to the amount of the assessment, and such an assessment is not unlawful.

Lastly, it is objected that the court ought not to have proceeded to final judgment between appellant and the city before the objections filed by other persons were disposed of. Appellant could not appeal from the verdict of the jury, and the statute provides for the judgment from which he could appeal, so that the validity of the assessment can be finally determined. The city is allowed 60 days after the appeal is disposed of to enter final judgment or abandon the proceeding. The provision of section 26 that no final judgment shall be entered until all the issues in the case have been disposed of relates to the final determination of the condemnation and assessment, after all the issues between the different parties shall be settled under the other provisions of the act. The judgment is affirmed. Judgment affirmed.

FISCHBACK v. PEOPLE ex rel. TETHERINGTON, County Collector.

(*Supreme Court of Illinois, June 19, 1901.*)

[60 N. E. Rep. 887.]

Objections—Waiver.—Objections not mentioned or argued by counsel in their brief will be regarded as waived.

Street Improvements—Assessment of Benefits—Objections.—Local Improvement Act 1897, § 66, provides that, on application for judgment of sale of property for assessments for local improvements, "no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof." *Held*, on application of the county collector for a judgment of sale of plaintiff's lot for an assessment for paving a street, that he could not object thereto on the ground that the paving was not done in accordance with the ordinance, and that as done it deprived him of a sidewalk in front of his premises, since these objections should have been made in the proceedings to confirm the assessment.

Appeal from county court, Madison county; William P. Early, Judge.

Application of the people, on relation of Tetherington, county collector of Madison county, for a judgment of sale against Benedict Fischback. From a judgment in favor of the relator, defendant appeals. Affirmed.

Dunnegan & Leverett, for appellant.

L. D. Yager, for appellee.

CARTER, J. On the application of the county collector of Madison county for a judgment of sale of appellant's lot in the city of Alton for the first installment of a special assessment levied to pay his proportion of the cost of paving Washington street, extending along the front of such property, the appellant appeared and filed objections to judgment, in substance—First, that there was no sufficient description of the property in the published notice of the application; second, that the improvement for which the assessment was levied was not made in accordance with the ordinance; and, third, that the improvement as made deprives objector of a sidewalk in front of his property.

As to the first objection, we find no substantial defect in the description, and, as counsel for appellant make no mention of this objection in their brief or argument, it must be regarded as waived. Inasmuch as we are of the opinion that the other two objections were properly overruled for other reasons, we need not consider the question raised by appellee that the ordinances given in evidence by appellant and set out in the record were not sufficiently proved, and were improperly admitted in evidence. It appears that in September, 1899, the city council passed an ordinance providing for the paving of Washington street with brick for the width of 42

feet, and for the paying of the cost of the work by special assessment levied upon property specially benefited. The assessment was made on such property, including appellant's lot, and was duly confirmed by the county court after notice to the property owners, including appellant. It does not appear that appellant appeared or filed any objections to the confirmation, and his counsel say in their brief that he does not object to the improvement of the street, but only to its being done in such a manner as to deprive him of a sidewalk in front of his property. After the judgment of confirmation, and in 1890, while the work was in progress, appellant objected to it, because, as he claimed, there would be no room left for a sidewalk in front of his lot. It further appears that afterwards the city council passed an ordinance which defined the lines and width of the space for a sidewalk on that side of the street, and which reduced the width of such space from the uniform width of 12 feet, as theretofore by ordinance provided, to a width from the curb line of the street as paved and improved, which varied from 12 feet to 4 2-10, according to the lot lines fronting on said street. There was some evidence that the city had theretofore constructed the sidewalk and placed it over the line on appellant's lot instead of in front of it, and that appellant had recovered damages for the trespass (City of Alton v. Fishback, 181 Ill. 396, 55 N. E. 150); and appellant testified that the curb of the improved street touched at some points on his property, but there was no evidence adduced showing where the true line was. It appears, however, from the evidence, that the improvement was made in strict conformity with the ordinance authorizing it, and the maps, plans, and detail drawings prepared by the city engineer, referred to in the ordinance, and which were on file in his office, and no sufficient reason appears why appellant could not have made and filed his objections in the county court on the application for confirmation. Section 66 of the local improvement act of 1897 provides that, on application for judgment of sale, "no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof." It may be that the actual construction of the improvement brought more directly and forcibly to his attention the fact, if it be a fact, that his property would not be benefited, or benefited to the extent it was assessed, by the improvement, than was done by the ordinance and its accompanying maps and plans. Still, that would not give him the right to appear and make the same objections on the application for sale that he should have made on the application for confirmation. It was not shown that the location of the improvement had been changed or was different from the one provided for in the ordinance, but only that a subsequent ordinance was passed changing the width of the sidewalk. The sidewalk ordinance did not change or purport to change the

ordinance under which the improvement was made, or to affect the improvement in any way.

Counsel cite and rely on Carter v. City of Chicago, 57 Ill. 283, to support the proposition that the city council had no power to appropriate so much of the street for roadway purposes, whereby abutting property owners would be deprived of a sidewalk in front of their premises. We do not understand counsel to insist that the ordinance for the improvement was and is void for lack of power of the city council to pass it, but if such were their contention, and the equitable doctrine announced in Carter v. City of Chicago, supra, were applicable here, we could not find, from the meager evidence in this record, that appellant is deprived of a sidewalk in front of his property. The judgment must be affirmed. Judgment affirmed.

MARTIN *et al.* *v.* WILLS *et al.*

(Supreme Court of Indiana, June 21, 1901.)

[60 N. E. Rep. 1021.]

Street Improvements—Local Assessments—Collection.—Where assessments have been levied on abutting property for expense of street improvements, under the act of 1889, known as the "Barrett Law," the assessments may be collected by a foreclosure of the lien and sale of the property, as provided in Burns' Rev. St. 1894, § 4294 (Horner's Rev. St. 1897, § 6777), as well as by precept issued by order of the city council, as provided in Burns' Rev. St. 1894, § 4298 (Horner's Rev. St. 1897, § 6780).

Same—Same—Constitutionality.*—The act of 1889 known as the "Barrett Law" provides that expenses of street improvements may be assessed on property benefited thereby, in proportion to the benefit received, and without regard to the value of the property. *Held*, that the law is not repugnant to Const. art. 1, §§ 21, 23, providing that no man's property shall be taken without just compensation.

Same—Same—Same.—The Barrett law is not in violation of Const. art. 1, § 26, providing that the general assembly shall not grant to any citizen privileges or immunities which on the same terms shall not equally belong to all citizens.

Same—Same—Same.—The act of 1889 known as the "Barrett Law" provides that expenses of street improvements may be assessed on property benefited thereby. *Held*, that such act does not provide for such assessment without a hearing as to such benefits, and even if it did it would not conflict with Const. U. S. Amend. 14 providing that no person shall be deprived of his property without due process of law.

Appeal from circuit court, Boone county; James V. Kent, Special Judge.

Action by Charles G. Wills and others against Thomas H. Martin and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

T. J. Terhune and C. M. Zion, for appellants.
P. H. Dutch, for appellees.

MONKS, C. J. Appellees brought this action to enforce

*See Lorden *v.* Coffey, 6 Mun. Corp. Cas. 113, and *note*.

the lien of an assessment for a street improvement, under the provisions of an act of 1889, and the amendments thereto, known as the "Barrett Law." The case was put at issue, and a trial by the court resulted in a special finding of facts, conclusions of law stated thereon, and judgment in favor of appellees, enforcing said lien. The errors assigned and not waived are: (1) The court erred in overruling the demurrer to the amended complaint; (2) the court erred in sustaining the demurrer to the third paragraph of answer; (3) the court erred in the conclusions of law.

Appellants insist that the assessments for improvement under the Barrett law can only be collected by precept issued by order of the common council of the city, upon the filing of a proper affidavit of the contractor, as provided in section 4298, Burns' Rev. St. 1894 (section 6780, Horner's Rev. St. 1897). It is true that a contractor may pursue the remedy provided in said section, but the assessment made against property for such improvements may also be collected by a foreclosure of the lien and sale of the property as provided in section 4294, Burns' Rev. St. 1894 (section 6777, Horner's Rev. St. 1897). Dowell v. Paving Co., 138 Ind. 675, 38 N. E. 389; Bozarth v. Mallett, 11 Ind. App. 417, 39 N. E. 176; Same v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042.

The other objection urged to the amended complaint, as well as the questions argued under the second and third errors assigned, is predicated on the theory that the Barrett law and the amendments thereto are in violation of sections 21 and 23 of article 1 of the constitution of this state, and that they are also in violation of the fourteenth amendment of the federal constitution, under the doctrine declared in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. Appellant contends that it was held by the supreme court of the United States in Village of Norwood v. Baker, supra, that a law providing for the apportionment of the cost of the improvement of a public street upon the abutting lots according to their frontage, without a hearing as to the special benefits to said property, is in violation of the fourteenth amendment of the constitution of the United States. Said Barrett law and the amendments thereto, as interpreted by this court, are not obnoxious to any provision of the state or federal constitutions, even if the contention of appellant as to the holding in Village of Norwood v. Baker, supra, is correct. Adam v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797; Defrees v. Ferstl, 154 Ind. 695, 696, 57 N. E. 266; City of Indianapolis v. Holt, 155 Ind. 222, 240, 57 N. E. 966, 988, 1100; Taylor v. City of Crawfordsville, 155 Ind. 403, 405, 58 N. E. 490; Schaefer v. Werling (Ind. Sup.) 60 N. E. 149. The supreme court of the United States, however, has held in a number of cases that no such rule as that asserted by appellant was declared in the case of Village of

Norwood v. Baker, supra. In Webster v. City of Fargo, 21 Sup. Ct. 623, 45 L. Ed. —, that court said: "But we agree * * * that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court, in Village of Norwood v. Baker, to hold otherwise." In French v. Paving Co., 21 Sup. Ct. 625, 45 L. Ed. —, it was held by the same court that a state law apportioning the entire cost of a street improvement upon the abutting lots according to their frontage, without any hearing as to the benefits, is not in violation of the fourteenth amendment to the constitution of the United States. The following cases decided by the supreme court of the United States on April 29, 1901, declare the same rule: City of Detroit v. Parker, 21 Sup. Ct. 624, 45 L. Ed. —; Cass Farm Co. v. City of Detroit, 21 Sup. Ct. 644, 45 L. Ed. —; Shumate v. Heman, 21 Sup. Ct. 645, 45 L. Ed. —; Farrell v. Commissioners, 21 Sup. Ct. 609, 45 L. Ed. —; Town of Tonawanda v. Lyon, 21 Sup. Ct. 609, 45 L. Ed. —. Finding no error in the record, the judgment is affirmed.

BAKER, J. (concurring). Appellants contend that the Barrett law not only conflicts with the fourteenth amendment of the federal constitution, but also contravenes those provisions of our state constitution which forbid the taking of property without just compensation and due course of law. In Adams v. City of Shelbyville, 154 Ind. 467, 478, 57 N. E. 114, 49 L. R. A. 797, it was held that the principles applicable to assessments for local improvements are these: "The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality. The legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district. Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. The taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits." In the dissenting opinion in Adams v. City of Shelbyville no disagreement with these principles was expressed, but, on the contrary, they were fully concurred in. The only point of difference was whether the Barrett law did or did not afford the prop-

erty owners a due opportunity to be heard on the question of special benefits, as an issue of fact. The right of a property owner to a hearing on the question of special benefits, as an issue of fact, was held to be guarantied by the state and federal constitutions. So far as the federal constitution was concerned, it was taken that the controlling principles were stated in Village of Norwood v. Baker. But the final and authoritative exposition of the federal constitution, and of the decisions of the supreme court of the United States in reference thereto, must come from that court. In a dissenting opinion in City of Indianapolis v. Holt, 155 Ind. 222, 259, 57 N. E. 966, 988, 1100, it was suggested that the supreme court of the United States might thereafter decide that a statute providing ample notice of assessments by frontage, and affording due opportunity to be heard on the question whether the assessments were equally and properly apportioned by frontage, but denying the property owner a hearing on the question of special benefits as an issue of fact, was not in conflict with the fourteenth amendment, but that until then the principles promulgated in Village of Norwood v. Baker should be followed. And in French v. Paving Co., 21 Sup. Ct. 625, 45 L. Ed. —, and other concurrent decisions, that court has so decided, and virtually overruled or construed away the Norwood-Baker decision. These later decisions are binding upon this court on the question of conflict between the street improvement laws of this state and the fourteenth amendment to the federal constitution. But they have no compulsive force with respect to the construction of our state constitution. How, then, does this case stand, in the light of the guaranties of our constitution? According to the principles announced in Adams v. City of Shelbyville, the appellants' property was not subject to assessment for street improvements, except under a law that afforded them a hearing on the question of special benefits as an issue of fact. In the same case it was held by a majority of the court that the Barrett law provided for such a hearing. And it is only on the basis that appellants were afforded their constitutional right to a hearing on the question of special benefits, as an issue of fact, under the Barrett law, as construed by a majority of the court, that I concur in the affirmance of the judgment.

HADLEY, J. I concur in the result, and also in the reasoning, assuming that no inference arises from the opinion that the legislature may, under the provisions of our state constitution, authorize the arbitrary assessment of special benefits by the front-foot rule, and deny to the abutter a hearing and an adjustment to the basis of actual benefits.

WILLIAM H. CARSON, Plff. in Err., *v.* SEWER COMMISSIONERS OF BROCKTON.

(*Submitted April 18, 1901. Decided May 27, 1901.*)

[21 Sup. Ct. Rep. 860.]

Drains and Sewers—Special Assessments for Use.—An ordinance imposing an annual rental for the use of a public sewer, the use of which is optional with the taxpayer, who is not required to pay unless he uses it, does not deprive him of property without due process of law, though it was passed without giving him notice or opportunity for hearing.

Same—Same—Due Process of Law.—The imposition of the cost of maintaining public sewers by special assessment upon property owners who have already been assessed for the cost of their construction, in case they make use of them, does not deprive them of property without due process of law, but is matter of public policy for the legislature, since they receive a special benefit from the construction of the sewer in the privilege of discharging their private sewers into it, even if they are not entitled to the free use of it.

In error to the Supreme Judicial Court of Massachusetts to review a decision denying a petition for writ of certiorari to review a sewer assessment. Affirmed.

See same case below, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1.

Statement by MR. JUSTICE BROWN:

This was a petition to the justices of the supreme judicial court for the county of Suffolk, for a writ of certiorari to the board of sewer commissioners of the city of Brockton directing them to bring up certain proceedings connected with the assessment of taxes upon petitioner's land to the amount of $42.53, for the maintenance and operation of a public sewer, and for an order quashing the proceedings.

The petitioner alleged the assessment to be illegal and void:

1. Because the city ordinance does not provide for notice to or hearing of persons whose estates are affected thereby, in violation of the state Constitution;

2. Because the method of computing the sewer charges is unreasonable and disproportionate;

3. Because petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax for the maintenance and operation of sewers from which he receives no special benefit;

4. Because such tax or sewer rental is in violation of the 14th Amendment to the Federal Constitution;

5. Because such tax is permissible only when founded upon peculiar and special benefits to the property so taxed, and then only to the amount of such benefits;

6. Because lands assessed for the construction of sewers cannot be said to receive an additional and special and peculiar benefit from the general oversight and operation of the same.

By an act of the legislature of Massachusetts, passed in 1892 [chap. 245], "to give greater powers to cities and towns in relation to the construction of sewers," it was enacted as follows:

"Sec. 1. The city council of any city except Boston, or a town in which common sewers are laid under the provisions of §§ 1, 2, and 3 of chapter 50 of the Public Statutes, or a system of sewerage is adopted under the provisions of § 7 of said chapter, may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by every person who enters his particular sewer into the common sewer, and may change the same from time to time. Such charges shall constitute a lien upon the real estate using such common sewer, to be collected in the same manner as taxes upon the real estate, or in an action of contract in the name of such city or town. Sums of money so received may be applied to the payment of the cost of maintenance and repairs of such sewers or of any debt contracted for sewer purposes."

Pursuant to this authority the city council of Brockton, on August 23, 1894, adopted an ordinance, of which the following is the material provision:

"Sec. 4. Every person or owner of an estate who enters his particular sewer into a common sewer shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: For unmetered water service, $8; for metered water service, 30 cents per 1,000 gallons of sewage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than $8, it being provided, however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or owner may place at his own expense a water meter, which shall be approved by the said commissioners, to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly, and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the city of Brockton."

The petition was denied, and petitioner sued out this writ of error.

Mr. William H. Carson in propria persona.

No brief filed for defendants in error.

MR. JUSTICE BROWN delivered the opinion of the court:

This case involves the single question whether a municipal ordinance making an annual assessment upon property owners for the use of a common sewer infringes upon any provision of the Constitution of the United States.

The supreme judicial court of Massachusetts held that the petitioner received a special benefit in the use of the sewer for which he might be charged; that the city, by building the sewer and receiving a part of its cost from the petitioner, did

not bind itself that the sewer should be maintained forever, or that the petitioner should be at liberty to use it free of further expense; that the charge for using it was a benefit distinct from that originally conferred by building it; that there was no charge unless the sewer were used; that the only questions were whether petitioner's sewer entered the common sewer, and what amount of sewage was delivered to it; and that, if the petitioner wished to be heard on either of these facts, he could resort to the courts; that the city council had a right to fix the charges without notice to the parties interested, unless, under the pretense of fixing an equitable rate, the ordinance should do what amounted to the taking or destruction of property.

The ordinance imposes an annual rent of $8 for unmetered water service, and for metered water service 30 cents per 1,000 gallons for sewage delivered to the sewer,—the quantity to be so delivered to be determined by the meter readings,—with the privilege to the commissioners of making a discount when equitable. As the supreme judicial court held that the municipality had power to adopt this ordinance under the public statutes of the commonwealth, and that such statutes were no violation of the state Constitution, we are concerned only with the question whether the petitioner was thereby deprived of his property without due process of law, or denied the equal protection of the laws within the 14th Amendment.

The validity of the legislative act is assailed upon the ground that no notice was required to be given to the property owner, nor provision made for a hearing, and that the authority given to the city council of Brockton to change the rate of sewerage charges and assessments from time to time manifested an intention on the part of the legislature to assess such property without regard to benefits. There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking and the compensation to be paid by the city. Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Palmer v. McMahon, 133 U. S. 660, 33 L. Ed. 772, 10 Sup. Ct. Rep. 324; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289, subsequently re-examined in this court in Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921.

Obviously these cases have no application to an ordinance which fixes beforehand the price to be paid for certain privileges, and leaves it optional with the taxpayer to avail himself of such privileges or not. As well might it be insisted that an ordinance which fixes water rates proportioned to the amount furnished is void because no notice is required to be given before such rate is fixed, or the taxpayer is assessed his proportionate charge under the ordinance. Where the use of such privilege is left optional with the taxpayer by his

election to avail himself of it or not, he contracts with the city to pay the rental fixed by its ordinance, if he elect to use it. In such case there is no room for the question of notice. Where notice will avail nothing, no notice is required. Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; Amery v. Keokuk, 72 Iowa, 701, 30 N. W. 780; Com. v. Lehigh Valley R. Co. 129 Pa. 429, 18 Atl. 406.

Thus in Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, it was said by Mr. Justice Field (p. 708, L. Ed. p. 572, Sup. Ct. Rep. p. 667): "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. . . . . Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter." See also Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943, 18 Sup. Ct. Rep. 521. Under the circumstances of this case no notice was necessary.

Similar considerations apply to the defense that petitioner has been, or is about to be, deprived of his property without due process of law. But of what property has he been deprived? None whatever. There has not been, nor is there anything to indicate there ever will be, any taking of his property within the meaning of the law. Assuming that the imposition of a burden which manifestly belongs to the public, upon private property, constitutes a deprivation of such property within the meaning of the 14th Amendment, there is nothing of the kind involved in this case. There is not even compulsory taxation of the property. The act of the legislature (chap. 245, act of 1892) merely provides that the city council " may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by every person who enters his particular sewer into the common sewer, and may change the same from time to time." The municipal ordinance fixes the annual rentals, determinable upon a certain basis of water service, with a provision that the commissioners may make an equitable discount from such rates at their discretion. This was all there was to it. The

lot owner could use the sewer or not, as he chose. If he used it, he paid the rental fixed by the ordinance. If he made no use of it, he paid nothing. There is no element of deprivation here or even of taxation, but one of contract, into which the lot owner might or might not enter. There is no allegation in the petition that the petitioner was required by the board of health to discharge into the public sewer. There is no allegation that the particular charges fixed by the commissioners are unreasonable, only that the method is unreasonable, that is, that any charge is unreasonable.

The stress of petitioner's argument appears to be laid upon the proposition that his property having been once assessed for the construction of the common sewer, he has a right to the free use of such sewer forever afterwards, and that the expense of its maintenance must be raised by general taxation, and not by special assessment. This, however, is a question of state policy. It was for the legislature to say whether the construction of the sewer entitled the adjoining property owners to the free use of it, or only to the right to a free entrance to it of their particular sewers. As held by the supreme judicial court, there can be no doubt that the adjoining property owners did receive a special benefit in being permitted to discharge their private sewers into it. The amount of such benefit was, under the statutes of the commonwealth, determinable by the city council, which fixed upon a certain rate for unmetered service and a certain other rate per 1,000 gallons of sewage discharged for metered service. We have held in the recent case of Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943, 18 Sup. Ct. Rep. 521, that it was competent for the legislative power to assess the amount of benefit specially received by abutting property, and so long as such amount is not grossly excessive, or out of all proportion to the benefit received, there is no reason to complain, particularly if, as held by the supreme judicial court in this case, the question of connecting with the public sewer be left optional with the property owner.

The case is somewhat analogous to that of Sands v. Manistee River Improv. Co., 123 U. S. 288, 31 L. Ed. 140, 8 Sup. Ct. Rep. 113, wherein we held that the exaction of tolls, under a state statute, for the use of an improved national waterway, is not within the prohibition of the due process of law clause of the Constitution. Said Mr. Justice Field (p. 293, L. Ed. p. 151, Sup. Ct. Rep. p. 115): "The tolls exacted from the defendant are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated. . . . Tolls are the compensation for the use of another's property or of improvements made by him, and their amount is determined by the cost of the property or of the improvements, and consideration of the returns which such values or expenditures should yield. The legislature, acting upon information received, may prescribe at once the tolls to be

charged, but ordinarily it leaves their amount to be fixed by officers or boards appointed for that purpose."

It is true that in Sears v. Boston Street Comrs., 173 Mass. 350, 53 N. E. 876, decided in May, 1899, construing a similar statute applicable to the city of Boston, the supreme judicial court made a decision which it is difficult to reconcile with its opinion in the case under consideration, and held that "where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston, such as to subject them to a second special assessment. Expenses of this kind should be made the subject of general taxation," citing a number of cases in support of this proposition, none of which appear to be in point. Hammett v. Philadelphia, 65 Pa. 146, 3 Am Rep. 615, was a case of widening and repaving a public street; Re Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255, one of compelling the owners of farm lands lying within 1 mile on each side of a public highway to pay for grading, macadamizing, and improving it, by an assessment upon their lands by the acre; Williamsport's Appeal, 187 Pa. 565, 41 Atl. 476, one of reconstructing a sewer originally built by the city; Erie v. Russell, 148 Pa. 384, 23 Atl. 1102, a similar case, except that the sewer was originally built by local assessments; Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299, a question of want of notice; Dyar v. Farmington, 70 Me. 515, one of assessment for building a railroad; Hanscom v. Omaha, 11 Neb. 37, 7 N. W. 739, one of the extent to which property was benefited by constructing a sewer. It needs no argument to show that these cases had no pertinence. The question of notice or want of notice was also considered in the Sears Case, but the court did not decide that question, intimating, however, an opinion somewhat adverse to the validity of the statute upon this ground.

We are not required, however, to reconcile these cases. It is sufficient that the supreme judicial court held that this case was "free from the elements which in Sears v. Boston Street Comrs. led to the conclusion that the petitioner was assessed without regard to the benefits received by him." Notwithstanding the former case we think the court was correct in holding in this case that the petitioner and other property owners whose lots abutted on this public sewer did receive a benefit not common to the inhabitants of the city generally, in being permitted to discharge into it the contents of their private sewers, that the amount of such benefit was determinable by the city council, and that in its action there was nothing violative of the Federal Constitution. It was properly said by Chief Justice Holmes in this connection: "No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was

the probability that the sewer would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary as a further special benefit to such as used it."

The judgment of the Supreme Judicial Court is therefore affirmed.

RICHARDSON *et al. v.* MEHLER.

(Court of Appeals of Kentucky, June 19, 1901.)

[63 S. W. Rep. 957.]

Public Improvement—Ordinance—Validity.—Under Ky. § 2826, part of charter of cities of first class, providing that "no public way shall be * * * constructed * * * except by ordinance recommended by the board of public works," the extent and character of the improvement must be fixed by the ordinance.

Same—Same—Same—What Sufficient Description of Improvement.—An ordinance providing that the carriageway of a certain street, from the center line of one street to the center line of another street, shall be of a certain width, "and shall be improved by grading, curbing, and paving with the vitrified brick or block pavement, with corner stones at the intersections of streets and alleys, and footway crossings across all intersecting streets and alleys, in accordance with the plans and specifications on file in the office of public works," sufficiently designates the extent and character of the improvement, though the plans and specifications referred to were not in existence when the ordinance was passed, and cannot, therefore, be considered in aid thereof; the ordinance being sufficient without reference to plans and specifications.

Power of Council to Cure Defects—Ordinance Must Not Be Wholly Void.—Ky. St. § 2834, part of charter of cities of first class, providing that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned," does not apply where an ordinance for the construction of a street is wholly void, as no liability can arise unless the proceedings have as a foundation an ordinance which is at least valid in part; and therefore the mere approval by the council of a contract entered into under a void ordinance will not suffice.

Notice of Inspection.—Under Ky. St. § 2837, providing that "the board of public works shall, by one insertion in one of the daily newspapers published in the city, give notice of the time and place fixed for the inspection and reception of the work by the board or its deputy or deputies," the inspection and reception of the work, being a ministerial act, may be proved by parol testimony, like any other fact, and it need not appear of record that a day was fixed for the inspection of the work, or that notice thereof was given; the requirement of Ky. St. § 2804, that all official business of the several boards of the city shall appear of record, while mandatory as to the boards, being directory merely so far as affects the rights of others.

Authority of Assistant Engineer to Receive Work.—As the statute authorizes the "deputy or deputies" of the board to receive or reject the work, and the chief engineer was, when elected, given power, by

order of the board, to receive or reject work as agent of the board, the assistant engineer appointed by the board may, when acting in place of the chief officer, accept the work; and, in any event, his action may be ratified by the subsequent action of the board approving the report of inspection and reception of the work.

Special Legislation—Purposes of Municipal Government.—Ky. St. § 2838, providing that in actions by a city of the first class to enforce liens for the cost of street improvements copies of the ordinance, contract, and apportionment shall be *prima facie* evidence of every fact necessary to enable plaintiff to recover, relates to a matter affecting municipal government, and is therefore valid, though it is special legislation; as Const. § 156, providing for the classification of towns and cities, authorizes special legislation for purposes of municipal government.

Erroneous Apportionment—Prima Facie Case.—A *prima facie* case is made out by copies of the ordinance, contract, and apportionment, though the apportionment be erroneous, and must be corrected

Failure of Advertisement to Fix Time for Completing Work—Waiver of Objection.—The time for the completion of the work should be fixed by the advertisement, and not after the contract has been let; but the objection that this was not done comes too late after the contract has been made and approved, the work done and accepted, and the apportionment made, in the absence of anything to show that defendants were prejudiced by the omission.

Unconstitutional Requirements—Failure to Object.—While an ordinance requiring persons engaged in the doing of public works of original construction to obtain a license was unconstitutional, yet as it does not appear that the ordinance was ever enforced, or that any one was prevented thereby from bidding, the objection to the assessment because of the existence of the ordinance comes too late after the work has been done and accepted, and the apportionment made.

GUFFY, J., dissenting.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Charles V. Mehler against Lizzie Richardson and another to enforce a lien for the cost of a street improvement. Judgment for plaintiff, and defendants appeal. Affirmed.

O. H. Harrison, for appellants.

Bodley, Baskin & Morancy, for appellee.

H. L. Stone, for city of Louisville.

DU RELLE, J. This is an appeal from a judgment enforcing a lien upon abutting lots for improving the carriageway of Twenty-Eighth street, between Kentucky and Greenwood avenue, in Louisville. The case has been so carefully prepared, the points relied on so clearly presented and so elaborately briefed, that we regret that in the limited time afforded us it will not be possible to do much more than state the questions and indicate the conclusions we have reached. The ordinance provided that: "The carriageway of Twenty-Eighth street, from the center line of Kentucky street to the center line of Greenwood avenue, shall be thirty-six (36) feet in width, and shall be improved by grading, curbing, and paving with the vitrified brick or block pavement, with corner stones at the intersections of streets and alleys, and

footway crossings across all intersecting streets and alleys, in accordance with the plans and specifications on file in the office of public works." It also provided that the work should be done at the cost of the owners of ground, as provided by law.

The first question presented is the validity of the ordinance. The law for the government of cities of the first class provides (section 2826, Ky. St.) that "no public way shall be * * * constructed * * * except by ordinance recommended by the board of public works." This is a legislative function, to be performed by the municipal legislature. The fact that it cannot be performed except upon the recommendation of a branch of the executive department does not render it the less legislative in its character. After the completion of the work under such an ordinance, it is provided (section 2837) that, before the cost of the improvement becomes a charge upon the lots contiguous thereto, there shall be an "inspection and reception of the work" by the executive representative of the city, at a time and place fixed, and of which notice is required to be given when the owners of such lots may, in person or by agent, "appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same and the contract therefor." Under the old charter of Louisville, the council originated its own legislation, and the inspection and reception of the work was performed by the engineer. Both proceedings were prerequisites to the creation of the lien; but we cannot concur in the contention on behalf of the appellee that there has been a material change in the nature of the power of the council to provide for such improvement under the act for the government of cities of the first class from the power exercise by that body under the old charter of the city of Louisville, or in the character of the action formerly taken by the engineer, but now done by the board. The new act merely puts limitations upon the power of the council, but in no wise changes the nature of the power. It is still legislative. So, as providing for the improvement is legislative, it must be performed by legislative act,—that is, by ordinance; and the ordinance must prescribe the extent of the improvement authorized, and the character of improvement to be made. This doctrine is abundantly supported by the authorities. Hydes v. Joyes, 4 Bush, 464, 96 Am. Dec. 311; City of Henderson v. Lambert, 14 Bush, 28; Zable v. Orphans' Home, 92 Ky. 90, 17 S. W. 212, 13 L. R. A. 668. The power to impose the burden of local improvements, being legislative, cannot be delegated. And, while it has been held by this court repeatedly that certain provisions of the constitution with regard to taxes eo nomine, and the mode of their assessment, did not apply to burdens of this character, because it was held that those provisions were not intended by the framers of the constitution to apply to them, the char-

acter of the power remains unchanged, and the imposition of the cost of local improvements as a charge upon property is none the less an exercise of the sovereign power of taxation. Hydes v. Joyes, 4 Bush, 467, 96 Am. Dec. 311; Bradley v. McAtee, 7 Bush, 671, 3 Am. Rep. 309. The extent and character of the improvement must be fixed by legislation. But when we come to consider what degree of definition and what extent of detail in statement is required by this rule, the line of demarkation becomes more shadowy. In general terms the doctrine is perhaps as well stated by Chief Justice Williams in Hydes v. Joyes, supra, as in any case to which our attention has been called. It is there said: "The amount of the improvement, as well as its kind and character, must be ascertained before it is done." And again: "It is as imperative on the council to ascertain what portion of a square needs improvement, when all does not need it, as it is to ascertain when a whole square needs it; and also as imperative to fix the character and quality of the work to be done on a part as the whole of a square. We do not say that, when a portion or all of a square needs improvement, and the council has ascertained these facts, and designated the grade and kind of improvement, in carrying out the general plan and outline of the improvement so designated the engineer may not be vested with the power to vary, so as to make the work practically subserve the purposes of the general scope of the ordinance as developments may determine; but what we do say is that the council must determine the portion of the street or squares, the grade and kind of pavements, and not authorize the engineer to ascertain and carry out these things without the approval of the council by ordinance." Under the general doctrine thus stated, we find that ordinances which designated the kind and character of the work to be done by reference to a general ordinance which prescribed how streets of that character should be constructed have been uniformly upheld (Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125), the general ordinance in such cases being read into the ordinance providing for the improvement. So, too, it has been held sufficient to refer to the ordinance, "even to an identified unofficial paper, for the details of the kind and amount of materials and labor to be used in the construction of the improvement; but in all such cases the ordinance or writing referred to as setting out in detail the character, kind, and amount of material and labor to be used in the improvement is to be taken and construed as if it was part and parcel of the ordinance containing the reference." Delaney v. Boman, MSS. opinion, Jan. 29, 1875; Burnett's Code, p. 543. See, also, Anderson v. City of Mayfield, 93 Ky. 230, 19 S. W. 598; Nunes v. Wellisch, 12 Bush, 363. The ordinance under consideration is amply sufficient to designate the extent of the improvement. It in general terms designates the character of the improvement, which is to be by grading, curbing, and

paving with the vitrified brick or block pavement, with corner stones at the intersections of streets and alleys, and footway crossings across all intersecting streets and alleys.

It is most earnestly contended by appellants that, as the ordinance provides that the improvement shall be made "in accordance with the plans and specifications on file in the office of the board of public works," and as it is conceded, or is at least highly probable from the evidence, that at the date of the adoption of the ordinance there were no plans and specifications of the improvement of the part of Twenty-Eighth street designated on file in the office of the board, the ordinance is absolutely void for uncertainty; or, if it be taken as referring to plans and specifications thereafter to be prepared and filed by the board in its office, that it is void as a delegation of legislative authority to a ministerial board, under the doctrine laid down in Hydes v. Joyes, supra; Zable v. Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668. There is much force in these contentions, and it must be conceded that the ordinance in question is dangerously near the line. We are clearly of opinion that the ordinance cannot be construed as referring to those "complete drawings and specifications of said work" which, by section 2829, it is the duty of the board to prepare before it advertises for bids. That section provides: "Whenever said board shall order any work to be done which, either by order of said board or according to law, is to be performed by independent contract, said board shall prepare and place on file in the office of said department complete drawings and specifications of said work." This seems to us clearly to look to the preparation of drawings and specifications giving complete details, with drawings of the work as it is to appear when completed, and estimates the amount of the various kinds of work to be done and material to be employed in its completion, and to the preparation of such drawings, etc., after the work is ordered to be done by independent contract, and before the advertisement for bids. The plans referred to in this section are not required to be made before the improvement is determined upon by the council, and cannot be construed to be referred to in the ordinance. They are the complete working drawings, specifications, and details upon which the bidders base their estimates and bids, and must, therefore, under the section, be in the office, and notice be given of their existence there, before the advertisement and the allotting of the contract. These are the plans and specifications referred to in section 2830, which the board is, by the statute, authorized to alter and modify; that section appearing to refer to matters of detail executive in their nature, the necessity for which may arise in the course of the execution of the work, and which, as the statute (section 2825) gives the board exclusive control over the construction of the streets, may properly be left to the executive discretion of the executive board. It follows, therefore, that as drawings

and documents which did not exist cannot be held to be part of an ordinance because referred to therein, the drawings and specifications made subsequent to the passage of the ordinance cannot be considered in aid of its terms.

Nor are we able to concur in the contention that the subsequent approval of the contract by the council is such legislative action upon the plans and specifications prepared subsequently to the enactment as to write them in the ordinance; or that, if the ordinance is void, it is within the curative power of the court, under section 2834, by which it is provided: "No error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned." Being legislative action, the ordinance must, if defective, be remedied by legislative action; and the statute distinctly provides (section 2777) that "no ordinance shall be altered or amended in any way, except by repealing it." Therefore, if the ordinance was void, the mere approval by the council of a contract entered into under it would not suffice. And we think the powers conferred by section 2834 upon the court are, in substance, the same as those possessed by the council,—that is, to rectify such errors as the council might have rectified,—and do not extend to validating a void ordinance, which can only be done by its repeal and re-enactment. The correct doctrine seems to be that the liability for such improvements must, under the statute, be created by legislative action of the council, and that legislation must be valid at least in part, or no liability can arise. If the foundation is a nullity, none of the subsequent proceedings can be validated. If the ordinance be wholly void, it cannot be authority for a valid contract, for there is no authority to make the contract except the ordinance. By such an ordinance there is created an obligation to pay for a service for which there is no common-law liability. Whitefield v. Hipple (Ky.) 12 S. W. 150. It could not be created except for the statute. It must be created in conformity thereto. The statute (section 2826) requires that the construction of streets shall be done by ordinance. It forbids that it shall be done except by ordinance. But, if the ordinance be valid, wholly or in part, the subsequent proceedings may be corrected by the council, or by the courts if the council fails to do so, provided the work has been done as required by either the ordinance or contract. This doctrine is supported by the argument in the cases of Hydes v. Joyes, supra; Murphy v. City of Louisville, 9 Bush, 194; Murray v. Tucker, 10 Bush, 240; Worthington v. City of Covington, 82 Ky. 268. The question, therefore, is narrowed to this: Is the ordinance sufficient without reference to plans and specifications? Upon this question the members of the court are not in entire accord. But a majority of the

court have reached the conclusion that the designation of the character of the work in the body of the ordinance is sufficient. The general nature of the work is undoubtedly prescribed by the provision that it is to be by grading, curbing, and paving with vitrified brick or block pavement. And, while there are many different kinds of vitrified brick, and possibly a greater number of ways of laying a pavement, the general nature of the pavement is the same in all, and so known to be to those who are familiar with such improvements. We are the more willing to concur in this view for the reason that the statute requires complete plans and specifications of the work to be filed in the office of the board of public works for the inspection of the bidders before the advertisement and letting; so that no harm can come to the citizens by reason of the bidders being kept in ignorance of details; and further requires that it is not until after the drawings and specifications are complete that the contract with reference to them is entered into. This conclusion is supported by the opinion of Judge Hazelrigg in Board v. Murray, 99 Ky. 425, 36 S. W. 180.

The next question is as to the sufficiency of the record of inspection and reception of the work. Section 2837, Ky. St., provides that: "When improvements in public ways have been made, * * * the board of public works shall, by one insertion in one of the daily newspapers published in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents and representatives, may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor." It is claimed that, as the acceptance of the work provided for in the section quoted is, in the absence of fraud or collusion, conclusive upon the property owners after the improvement has been made in accordance with the ordinance and the contract, the board is thereby created into a kind of tribunal of limited jurisdiction, and that the facts necessary to authorize its jurisdiction must appear in its record; that the statute (section 2804) provides that "all official business of the several boards shall be transacted at the offices thereof, and a continuous indexed record or minute shall be kept at such offices respectively of such business," and requires further that each board shall cause a full journal of its proceedings to be kept; and that from this it follows that, as it was by appellants shown that there was no entry in the records of the board of public works showing the fixing of a day for the inspection of the work done under this ordinance, or the selection of a newspaper in which notice should be given, or the direction that such notice should be advertised, the board had no jurisdiction to act by inspecting and accepting the work. We do not think this contention can be sustained. It is not contended that the notice fixing the time and place for the inspection and reception of

the work was not in fact published in such a paper as the law requires, or that the acting chief engineer of the city did not then and there appear, and on behalf of the board inspect and receive the work, as completed in accordance with the ordinance and contract. On the contrary, the record of the board relied on shows a recital in the order for the apportionment that these things had been done, as does also the certified copy of the engineer's report. We do not think the authorities relied on, and which are for the most part cases where the record of legislative bodies was in question, apply to this case. The board is ministerial and executive in its nature, and, while the inspection of work and the determination whether it has been done in compliance with the contract may seem to partake of the nature of judicial action, it is not more so than many other acts which are considered to be purely ministerial; as, for example, the reception of goods under contract by the agent of one of the contracting parties. The board, it is true, is required to keep record of its proceedings; but, while that provision might be considered mandatory as to the board, we think it directory in so far as the rights of others are concerned. The inspection and reception of the work is a ministerial act, and may be proved like any other fact. The same ruling would seem to apply as applies to acts of corporations. Dill. Mun. Corp. § 300. The board was authorized to inspect and receive work by deputy or deputies. The record discloses that it authorized the chief engineer, as agent of the board, to receive or reject the work. It appears that the chief engineer, when elected, was, by order of the board, given "power, as agent of the board of public works, to receive or reject work," and it is contended that, if the "agent" can be construed to be "deputy" under the statute, it gave no authority to an assistant engineer to so accept work as the agent of the agent appointed. The majority of the court are of opinion that, the act being ministerial, and the statute authorizing it to be done by deputy or deputies, it may be performed by a subordinate agent appointed by the board while acting in the place of the chief officer, and, at all events, such action may be ratified by the subsequent action of the board approving the report of inspection and reception of the work. Barrett v. Stone Co. (Ky.) 52 S. W. 947.

The next question presented is upon the constitutionality of section 2838. That section provides: "In all actions to enforce liens, a copy of the ordinance authorizing the improvements or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be prima facie evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be prima facie evidence of every other fact necessary to be established by the plaintiff in such actions to entitle him to the relief authorized to be given in this act." This is the part of the section the

constitutionality of which is assailed as being in violation of section 59 of the constitution, which provides: "The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: (1) To regulate the jurisdiction, or the practice, of the circuits of the courts of justice. * * * (22) To authorize the creation, extention, enforcement, impairment or release of liens." This statute is also objected to as being in conflict with the sentence of section 60 of the constitution which provides: "No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law, nor where the courts have jurisdiction to grant the same or give the relief asked for." It is urged that the statute is a local, special act, because it provides a special rule of evidence applicable only to a specified class of actions, and to those only when they arise in cities of the first class; that, but for this provision, the ordinary practice would be to require the plaintiff in such suit, where the averments of his petition were denied, to produce competent, legal, and sufficient evidence to sustain his allegations. And, further, it is insisted that it gives to the contractor in such cases the privilege of obtaining the relief sought upon the production of evidence which would be insufficient in other cases, and that, too, in a case where the courts have jurisdiction to give the relief asked for, if the evidence required in other cases were produced. The cases cited from the Pennsylvania court—City of Philadelphia v. Haddington M. E. Church, 115 Pa. 291, 8 Atl. 241; Ayars v. Westfield, 122 Pa. 266, 16 Atl. 356, 2 L. R. A. 577; Engle's Appeal, 137 Pa. 494, 21 Atl. 74—would seem to support appellants' contention. In considering the question presented, all those parts of the constitution which relate to this matter must be considered together, and it must be borne in mind that section 156, with regard to municipalities, is an exception to section 59. That section provides that: "The cities and towns of the commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." The Pennsylvania cases seem to hold that the classification of cities authorized by the constitution of that state is confined to legislation for purposes of municipal government only, and that legislation relating to matters not under municipal control, or affecting the municipal government, is unconstitutional. This doctrine has been recognized by this court in the case of City of Louisville v. Kuntz, 47 S. W. 592, and been applied to the six-months statute of limitations provided in the act for the government of cities of the first class, applicable to actions against the city for dam-

ages for injuries to persons or property, which was held to be in violation of the clause of section 59 of the constitution providing against local or special acts "to regulate the limitation of civil or criminal causes." Assuming that the doctrine, as broadly stated in the Pennsylvania cases and recognized in the Kuntz Case, is the correct doctrine, the question is whether the present statute is sustainable as relating to matters under municipal control or affecting the municipal government. It may be said that it is easy to see that an act which provides a special statute of limitations for actions against cities of a designated class, or even of the classes provided for, does not in any way affect municipal government, or relate to matters properly under municipal control. On the other hand, it is equally easy to see that provisions for the improvement of the streets of a municipality do relate to municipal government, whether the improvement is done at the expense of the municipality or at the expense of the abutting property. So the power to make the provision for payment for such improvement would seem also to be properly within the powers of the municipal government. And this power of providing for payment by the municipality, or out of the abutting property, seems to us, in case the cost of construction is to be made a charge upon the property, to necessarily include the power of providing means whereby such a charge may be created, shown, and enforced. If the municipality, in the exercise of governmental powers, can make the cost of construction of a public way a charge upon adjacent property, it must do so by creating a lien; and, if the governmental power extends that far, we see no reason why it may not extend to making provision for the time and manner in which the lien shall attach, the mode in which it may be shown to exist, and the means of its enforcement. The argument that the right to prescribe the means by which the existence of a lien for street improvements may be shown is not within the grant of section 156 of the constitution seems to us to be equally applicable to the right to prescribe for the creation of such lien, and, if sustained, would utterly destroy the power of the municipalities to make such improvements a charge upon the property supposed to be benefited thereby. This we cannot conceive to have been the intention of the framers of the constitution, and, while we concur in the general statement of the doctrine in the Pennsylvania cases, we are unable to concur in its application.

It is urged in the same connection that, even if the statute is held constitutional, and certified copies of the ordinance, contract, and apportionment are prima facie evidence of every fact necessary to enable plaintiff to recover, still the apportionment was erroneous, and a link in the chain was thereby broken, which destroys the whole chain; that the statute gives no effect, as prima facie evidence, to certified copies of any one or two of the three things specified in the statute

in the absence of the other, and that, if one is missing or defective, the whole chain fails. We do not think the statute was intended to produce such an effect, nor have we ever so applied it. On the contrary, in numerous cases—among them the case of Fehler v. Gosnell, supra—we have sustained the prima facie case made out by the contractor by filing certified copies of the three papers, though we directed the apportionment to be corrected. It is not at all as if no copy of the apportionment was filed, or no apportionment made. An apportionment was made, though for a greater amount by 10 per cent. than was proper under the circumstances, and was available to make out the prima facie case provided for by the statute, although subsequently corrected by the court. The defect in the apportionment had merely the effect to stop costs and interest until it was corrected.

The next objection is made upon the ground that the advertisement did not fix the time for the completion of the work. It is argued that the time for the completion of the work was not fixed until after the advertisement had been had, and the letting made; and it is insisted that this was very prejudicial to the interests of the property holder, as affording an opportunity to prevent proper competition by putting it in the power of the board to make the time easy to persons in favor with that body, or difficult to bidders who were obnoxious to it. These objections seem to be well founded. The bidding ought to be under circumstances which would give to every prospective bidder equal advantages in estimating the cost of completing the contract; and the time within which it is required to be completed is, in our judgment, quite material in making such estimates. But we are of opinion that these objections come too late after the contract has been made and approved, the work done and accepted, and the apportionment made, as it is not shown that appellants were thereby prejudiced. Barrett v. Stone Co. (Ky.) 52 S. W. 947; Dumesnil v. Stone Co. (Ky.) 58 S. W. 371.

Objection is made upon the ground of the unconstitutional license ordinance, which, it is insisted, must have had a prejudicial effect upon persons desiring to bid upon the work. That ordinance was adopted in 1896, and required all persons engaged in the doing of public works of original construction, etc., to first take out a license therefor, for which a payment of $100 was required. The license fees were payable in advance into the sinking fund, and any one engaging in such work without first taking out the license required was subject to a fine of from $5 to $20 per day, each day's work being regarded as a separate offense. 2 Biennial Comp. Ord. p. 134. In Figg v. Thompson (Ky.) 49 S. W. 202, it was held that the ordinance was unconstitutional, and against public policy, as tending to limit the number of bidders for such work, and to increase the cost of street improvement to the

lot owners. We are of opinion that this objection also comes too late. It does not appear that the ordinance was ever enforced, or that any one was prevented from bidding by the ordinance in this case. Fehler v. Gosnell (Ky.) 35 S. W. 1125. For the reasons given, the judgment is affirmed.

GUFFY, J. I dissent from the opinion rendered in this case for several reasons, among which I mention the following: My opinion is that the ordinance which, it is alleged, authorized the improvements for which the property of the appellants was adjudged to be sold, was utterly void. This being true, there can be no valid contract made or entered into for such improvements, and no lien could be created upon the property of the appellants for the improvements in question. The act of the legislature which attempts to authorize such improvements as those in question to be made at the cost of the property owners is in violation of section 171 of the constitution of this state. It is too clear for argument that the burden imposed by the law in question is a tax. It is manifestly for the benefit of the public, and hence it must be true that it should be levied upon all the property within the territorial limits of the city authority levying the same. The act in question is also in violation of section 13 of the constitution and section 242. Section 13 provides that no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him. Section 242 provides that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation, etc. It is perfectly manifest that the street improvements in question are made for the benefit of the public use, and the public has the same right to enjoy and use the same that the property owner has, and it therefore follows that requiring the property owner to pay the expense of the improvements in question is in violation of the several sections of the constitution supra. The statute is also in violation of the federal constitution, which provides that no person shall be deprived of his property without due process of law. Section 2838, Ky. St., is also in conflict with subsection 22 of section 59 of the constitution. The said subsection forbids the legislature by special act to authorize the creation, extension, and enforcement, impairment, or release of liens. It will be seen from the statute in question that it provides for the creation of liens in the city of Louisville in regard to street improvements, and provides what shall be evidence of the acts necessary to create such liens, while no such provisions are made in respect to the creation of other liens in any other part of the state, nor as to other liens in the city. The statute is also in conflict with subsection 1 of section 59, which prohibits the legislature from regulating the practice or jurisdiction of courts of justice, and the statute in question provides a rule of evidence in respect to street

improvements that is not made applicable to any other controversy. In my opinion, the object of the present constitution was to give complete and equal protection to all the citizens of the commonwealth, and any law which requires the citizen of any town or district to pay for public improvements is in violation of the constitution, and contrary to natural justice; that it is substantially taking private property for public use without any compensation. If the streets and sidewalks are necessary for the public, the whole public should pay for the same. If they are not for public purposes, there is no excuse at all for making the same. Many other reasons might be given showing the illegality and injustice of the so-called statutes under which these oppressive burdens are enforced; but, inasmuch as the same would not affect the majority opinion in this case, I deem it unnecessary to specify the same. I most earnestly and respectfully dissent from the opinion rendered in this case. It is a well-settled rule of law that a party seeking the enforcement of a statutory right or remedy must pursue the statute strictly, or at least substantially. It seems to me that the statute itself has been almost totally disregarded in this case. It seems clear to me that the judgment appealed from should be reversed, with directions to the court below to dismiss the petition.

BARFIELD *et al. v.* GLEASON *et al.*

KIMBERGER *et al. v.* BITZER *et al.*

(*Court of Appeals of Kentucky, June 22, 1901.*)

[63 S. W. Rep. 964.]

Streets—Construction—What Constitutes.—The mere grading of a dirt road so as to form a crown, and to leave depressions at the sides for surface drainage, and the leveling of inequalities, does not constitute a street construction.

Same—Same—Assessments—Constitutionality.—Ky. St. § 2838, providing for the original construction of streets in cities of the first class at the exclusive cost of the owners of abutting property according to area, is not unconstitutional.

Same—Same—Same—Same—Benefits and Costs.*—A street assessment will not be held to be an arbitrary and unconstitutional taking of property merely because the benefits from the street are not commensurate with the cost, as the legislature has a large discretion in defining the property deemed to be specially benefited, and the courts will not interfere, except upon a showing of fact so conclusive as amply to justify their interference.

Same—Same—Same—Same—Same—Preliminary Hearing.—The fact that a state statute providing for the original construction of streets at the exclusive cost of the owners of abutting property according to area makes no provision for a preliminary hearing as to the extent of special benefits to each piece of property resulting from the improvement does not render it violative of the fourteenth amendment to the constitution of the United States.

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*See Lorden *v.* Coffey, 6 Mun. Corp. Cas. 113, and *note*.

Barfield *v.* Gleason

Compensation for Injuries to Property.—Under Const. § 242, providing that "municipal and other corporations, and individuals invested with the privilege of taking private property for public uses, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction,"—an ordinance for a street improvement is not void because it fails to provide for compensation for the injury to abutting property from the excavations necessary to be made to conform the street to the grade theretofore fixed by the city council, as a statute or ordinance which results in injury to property is not unconstitutional because it fails to provide for compensation to be made for the injury before it is done.

Unnecessary Change of Grade—Remedies.—Though the change in the grade was unnecessary, and might have been prevented by injunction, and though the excavations necessary to conform to the grade might have been prevented until compensation had been provided for the injury to be occasioned thereby, yet, as neither of these things was done, the defendants in an action by the contractor to enforce his lien cannot have the cost of the excavation, which has been included in the assessment, apportioned among them, and recover against the city the amounts apportioned, the remedy being an action at law to recover the damages which have actually accrued from the change of grade.

Apportionment Warrant—Not a Tax.—The making out of an apportionment warrant is not the levy of a tax, and may be performed by an executive board.

Streets — Construction — Assessment—Constitutionality.—A statute providing for the construction of streets at the cost of abutting property owners is not unconstitutional because it does not require the contract for such construction to be approved by the city council, as that is a ministerial act, and may be entrusted to an executive board.

Apportionment Warrants—Irregularity—Lien—Validity.—All the requirements of the statute necessary to create a lien having been complied with, the fact that the apportionment warrants were not approved by the mayor and council, as required by an ordinance, does not affect the validity of the lien.

Time of Passage of Ordinance—Records Conclusive.—The records of the council showing that an ordinance was passed by the two boards on different days is conclusive of that question, and cannot be overcome by the recollection of a witness; and, besides, the statement of a witness that an ordinance was passed by both boards on the same night may be consistent with the proper passage of the ordinance by one of the boards at a subsequent date, which is a sufficient compliance with Ky. St. § 2777, providing that an ordinance shall not be passed by both boards on the same day.

Repairs—Contract—Construction.—Where the contractor was required by the contract to keep the street in repair for five years, and, in order to secure that undertaking on his part, was required to deposit bonds amounting to 10 per cent. of the contract price, it will be presumed that this provision did not increase the cost of the improvement beyond the 10 per cent., as the court of appeals had previously construed such a provision in a street-improvement contract as binding the contractor only to that extent for repairs, and it must be presumed that plaintiff contracted with reference to that construction.

Prima Facie Case—Judgment.—Proper averments of the steps leading to the creation of a lien, supported by the exhibits required to make out a *prima facie* case, entitle plaintiff to a judgment in the face of a mere denial as to the fixing of the grade of the street.

Necessity of Improvement—Conclusiveness of Council's Determination.—After the work is done, the legislative determination of the council that the improvement was necessary will not be disturbed, except upon a showing of abuse of discretion so conclusive as to amply justify the interference of the court.

Release of Contractor—Property Holder's Remedy against City.—Where the city, without good cause, released an accepted bidder, who

had given bond with solvent surety, and the bid accepted upon a second advertisement, though the lowest one then made, was considerably higher than that of the released contractor, the property owners are entitled to judgments over against the city for the difference.

Appellate Jurisdiction.—As the lien of the contractor is enforceable in a single suit against all the landowners, and the court of appeals has jurisdiction of an appeal from the judgment enforcing that lien it will retain jurisdiction of the appeal for the purpose of giving the appellants relief against the city, so as to do justice between the parties though the claim of each appellant against the city may be less than $200.

GUFFY, J., dissenting.

Appeals from circuit court, Jefferson county, common pleas division.

"To be officially reported."

Actions by J. R. Gleason and others against David R. Barfield and others, and by Peter Bitzer and others against V. Kimberger and others, to enforce liens for the cost of street improvements. Judgment for plaintiffs, and defendants appeal. Reversed.

W. W. Thum, Phelps & Thum, and Stanley E. Sloss, for appellants Barfield and others.

H. M. Lane, for appellee Gleason.

F. W. Morancy, for appellee Bitzer.

H. L. Stone, for appellee City of Louisville.

DU RELLE, J. The action first named was brought by the contractor against a number of persons owning property on Catalpa street, to subject the property to the payment of an assessment made for the original improvement of Catalpa street between Woodland avenue and Gibson lane. The petition was in the usual form in such cases, and sufficiently alleged in detail the various steps necessary to create a lien for the cost of the construction. A copy of the ordinance authorizing the improvement, the contract therefor, and the apportionment, properly attested by the comptroller, were filed, as required by Ky. St. § 2838, to establish prima facie evidence of the facts necessary to entitle the contractor to the relief he sought. An answer was filed by appellants, by the first paragraph of which practically all of the affirmative averments of the petition were denied, and the remaining seven paragraphs of which present various affirmative defenses, which will be stated as we consider them in this opinion. The material averments of this answer were denied by the reply. An amended answer was subsequently filed by appellants, by which they undertook to set up the defense that the city had no power to authorize the construction of the street at the cost of the abutting property holders; that the assessment for that cost was unconstitutional, because not uniform, and not assessed upon an ad valorem basis; and, further, that the assessment was a taking of property without due process of law. The contractor filed an amended petition, praying judgment against the city of Louisville for any part of the appor-

tionment warrants for which it might be determined that no lien existed in his favor. A number—but possibly not all—of the appellants filed an amended answer, which they made a cross petition against the city, amplifying the averments of certain of the paragraphs of their original answer, and alleging that the city had contracted with one McNaghton for the construction of the same improvement at a much lower rate than that at which the contract was subsequently awarded to Gleason; that, without reason or right to do so, McNaghton was released from his contract, together with his solvent surety, and thereby the cost of the work to the appellants was increased at least 25 per cent.; that by reason of the ordinance providing for the improvement, and the work done in pursuance of it, a large amount of excavation, which was totally unnecessary, and not a public improvement, was done, and the cost thereof charged against appellants in the sum of over $1,000, and that, if there is any liability for the excavation, it should be charged against the city; and they prayed judgment against the city for the amounts charged against them respectively. To this cross petition a demurrer by the city was sustained. Several hundred pages of testimony were taken upon the issues of fact, and almost an equal quantity of briefs filed upon the facts and the legal propositions presented. The trial court decided the questions of fact adversely to appellants, and, as the contract contained the provision for repairs of the improvement for five years, which was condemned by this court in Fehler v. Gosnell, 99 Ky. 394, 35 S. W. 1125, judgment was rendered enforcing the lien for 90 per cent. of the amount of the assessment.

The case of Kimberger v. Bitzer—the second case named in the caption—presents almost exactly the same state of pleadings and facts. The cases were heard together in the trial court and in this court, and will be considered together in this opinion.

The questions presented are so numerous, the arguments thereon so voluminous, and the time remaining to us so short, that in these cases, as in the case of Richardson v. Mehler, 63 S. W. 957, we shall not attempt more than a brief statement of the facts, the questions, and our conclusions, making no reference to the questions disposed of in the Richardson Case.

Questions of Fact.

It is not necessary to state or consider all of the questions of fact raised in this record. A sufficient statement will be made to show the general nature of the questions and the conclusions we have reached. Catalpa street was originally a public way of the town of Parkland, a suburb of the city of Louisville. It was claimed originally by the appellants that it had for a long time been a public way, dedicated to public use, and had been graded and improved. This claim was

altered substantially by a denial of the dedication and a denial of the annexation of Parkland. The testimony offered clearly shows that long prior to the annexation it was in general use by the public as a public way; that it had been worked about as much as an ordinary dirt road is usually worked in the county outside of the city. Joyes v. Shadburn, 10 Ky. Law Rep. 493. Owing to the sandy nature of the soil, it was, in wet weather, rather better than most of the country roads under like conditions. Its surface, except where affected by the travel over it and by the working referred to, practically conformed to the natural surface of the soil. It appears reasonably certain that it answered the purposes of the neighborhood, and that the property holders strenuously objected to its improvement as a city street, on account of the expense. It is reasonably certain also that no such work was done upon this street as could, in any just sense, be considered the construction of a street. The mere grading of a dirt road so as to form a crown, and to leave depressions at the sides for surface drainage, and the leveling of inequalities, does not constitute a street construction. Ormsby v. Jamison, 9 Ky. Law Rep. 325; McHenry v. Selvage (Ky.) 35 S. W. 645; Mackin v. Wilson (Ky.) 45 S. W. 663. It is reasonably certain also that while, for the purposes of the city of Louisville, there existed a necessity that this street, or some other of the adjacent streets, should be improved so as to make an inlet to the business portion of the city for the gardening territory lying beyond and adjacent to the city limits, yet some other street—such as Twenty-Sixth street—might just as well have been selected for the purpose. The weight of the testimony is decidedly in favor of the proposition that the selection of the elevation at which the street was to be built, and the fixing of that elevation by the counsel on the recommendation of the board of public works, was injudicious, for the reason that it required an unnecessary amount of excavation to bring the surface to the proposed level, and did not accomplish the result intended as to surface drainage of the adjacent territory. We cannot but believe that the fixing of the level resulted in distinct injury to such of the abutting property as was already situated at an acceptable height above the original level of the road. The testimony tends to show that the McNaghton contract was to make the improvement with a better brick than that finally used, and at a very advantageous price to the property holders. There are some suspicious circumstances shown with regard to the condemnation by the board of the brick which were used for the improvement of other streets for which McNaghton had obtained contracts in that neighborhood, and which condemnation is claimed to have resulted in his release. and also with regard to the charge of favoritism shown to the Bannon brick, which were used in the improvement as made; but there is no showing that the contractor who constructed the improvement had any connec-

tion whatever with this. The Ohio brick called for by McNaghton's contract are shown quite conclusively to be, in general, better brick than the Bannon brick. On the other hand, the evidence is quite conflicting as to the quality of the particular lots of Ohio brick which were condemned for use upon the other streets. The relationship between Mr. Bannon, the manufacturer of the Bannon brick, and Mr. Nevin, of the board of public works, relied on as tending to establish fraud and favoritism in the rejection of the Ohio brick, and the acceptance of the Bannon brick, in the second contract, proves to consist in the fact that the first wives of Bannon and Nevin were sisters. Both of these ladies, however, were dead some 20 years before the matters in dispute occurred. The evidence tends to show also that, while McNaghton himself was probably insolvent at the time of his release, the National Surety Company, which was his surety upon his bond, was perfectly solvent, and that it was improvident upon the part of the board of public works to recommend, and the council to adopt, a resolution releasing him therefrom; the only showing made in support of the release being his request for release, his statement that he was insolvent, and the consent of the surety company that he be released, provided the company was relieved from "reliability" upon his contract. At the second bidding under the ordinance no contract was let. At the third bidding the contract was let to Gleason at substantially the same bid he had made at the second bidding, and which was about 33 per cent. higher than the McNaghton contract. A number of apparently sufficient reasons can be suggested for the differences in the bids. The general ordinance referred to in the ordinances for the improvement of the streets required a contract to keep the streets in repair for five years, and required also the putting up of collateral security to secure such repairs. The temper of the property holders was such as to almost insure tedious and costly litigation over the cost of the improvement, and the experience of McNaghton with his other contracts in the vicinity might well have acted as a deterrent to bidders. The street was undoubtedly a costly one.—probably the most costly brick street ever constructed in Louisville. The increased cost seems probably to be due more to the excavation than anything else, though the long haul of materials, necessitated by the locality, undoubtedly contributed somewhat to it.

The Constitutionality of the Kentucky System of Apportionment.

Little time need be spent in considering the question whether the square-foot system of apportionment adopted in this state for cities of the first class, by section 2833, Ky. St., is objectionable under the Kentucky constitution. The general doctrine is well stated by Dillon as follows: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local

improvement is a branch of the taxing power, or included within it; and the many cases which have been decided fully establish the general proposition that a statute authorizing the municipal authorities to open or establish streets, or to make local improvements of the character above mentioned, and to assess the expense upon the property which, in the opinion of the designated tribunal or officers, shall be specially benefited by such street or improvement, in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or superficial contents, is, in the absence of some special constitutional provision, a valid exercise of the power of taxation. Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property, or other property especially benefited, and, if in the latter mode, whether the assessment should be upon all property found to be benefited, or alone upon the abutters according to frontage, or according to area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject. Whatever limitation there is upon the legislative power of taxation (which includes the power of apportioning taxation) must be found in the nature of the power and in express constitutional provisions." 2 Dill. Mun. Corp. § 752. See, also, Cooley, Tax'n, 459, 460; 2 Beach, Pub. Corp. § 1175; Elliott, Roads & S. § 396. In Kentucky there is a long line of decisions to the same effect, beginning with the opinion of Judge Robertson in City of Lexington v. McQuillan's Heirs, 9 Dana, 513, 35 Am. Dec. 159; City of Louisville v. Hyatt, 2 B. Mon. 177, 36 Am. Dec. 594; Id., 5 B. Mon. 199,—in which the area mode of assessment has been sustained. In Baptist Church v. McAtee, 8 Bush, 510, 8 Am. Rep. 482, the doctrine, together with the constitutional limitation, is thus stated by Judge Lindsay: "It is certainly well settled in this state that the cost of the original construction of streets of a city may be imposed upon the owners of real estate alone without violating the constitutional limitations upon the legislative power of taxation. * * * In proportion as the trade and population of a city increases, the value of real estate advances. The owners of such real estate receive and enjoy very nearly the sole permanent advantages accruing to the city from the construction, repair, and reconstruction of the streets upon which that property may be situated. The general public certainly receive incidental benefits from such improvements, but the benefits to owners of real property are directly appreciable and permanent. The original improvement enhances the value of lots adjacent to the street improved by making it accessible to the public, and attracting trade and population." See, also, Preston v. Roberts, 12 Bush, 570, Nevin v. Roach, 86 Ky. 492, 5 S. W. 546, and Watson v. Nevin, Id. The same

doctrine has been again and again affirmed in cases arising under the new constitution. Gleason v. Barnett (Ky.) 50 S. W. 67; Gosnell v. City of Louisville (Ky.) 46 S. W. 722; McNaghten v. Industrial School (Ky.) 44 S. W. 380. This question is no longer an open one.

Spoliation.

The act being constitutional, does this case present such an arbitrary exercise of power thereunder as to work manifest injustice, and come within the rule announced by Judge Holt in Preston v. Rudd, 84 Ky. 156, as being spoliation and not taxation? In that case the rule was thus announced: "Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement. The principle is that the territory is benefited; that it has common interest; and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise; but it approaches equality as nearly as is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited." This rule, however, cannot be so extended as to entirely take from the citizen his property. This would work a "manifest injustice." It would be a spoliation, and not taxation. Under the guise of benefit and taxation, he cannot be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use without compensation. The assessment there was held to be an arbitrary and unconstitutional taking of property. But in the case at bar the showing on behalf of the property holders falls very far short of presenting a case of spoliation. The weight of the evidence tends very strongly to the conclusion that the abutting property was benefited by the making of the street, but that some of it was injured by the change of grade, perhaps to a greater extent than it was benefited by the street. The damage resulting from the change of grade will be considered later. Leaving that damage out of consideration, there can be but little doubt from the testimony that the street as constructed was a benefit to adjacent property. The testimony of the witness Pearson, formerly city engineer, seems to us conclusive upon that point. Whether the benefit was as great as the cost is another question.

While this system of taxation for local improvements proceeds upon the theory of equivalents, exact compensation has never been deemed attainable, or even hoped for, under any system of law yet devised. The question whether the contiguous territory would be benefited, and the boundary within which benefit therefrom is to be presumed, has uniformly been construed to be a matter of legislative discretion; and, that discretion having been exercised with the presumption of law in favor of its correctness, the courts will not intervene to disturb the legislative determination, except upon a show-

ing of fact so conclusive as amply to justify their interference. No such showing is made by this record. The witnesses for appellants almost uniformly base their evidence that the improvement was harmful, rather than beneficial, upon the injury occasioned by the change of grade, and the increased cost occasioned by the reletting. In Village of Norwood v. Baker, 172 U. S. 278, 19 Sup. Ct. 190, 43 L. Ed. 447, Mr. Justice Harlan, speaking for the court, thus stated the doctrine upon this question: "Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property; such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. Mobile Co. v. Kimball, 102 U. S. 691, 703, 704, 26 L. Ed. 238; Illinois Cent. R. R. v. City of Decatur, 147 U. S. 190, 202, 13 Sup. Ct. 293, 37 L. Ed. 132; Bauman v. Ross, 167 U. S. 548, 589, 17 Sup. Ct. 966, 42 L. Ed. 270, and authorities there cited. And according to the weight of judicial authority the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In Williams v. Eggleston, 170 U. S. 304, 311, 18 Sup. Ct. 617, 619, 42 L. Ed. 1047, 1050, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: 'Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement.' " So, in Preston v. Roberts, 12 Bush, 570, in an opinion by Judge Cofer, it was said: "All municipal assessments are based on the ground that the property subject to assessment is benefited by the improvement for which the assessment is made, and neither the legislature of the state nor the municipality can constitutionally subject property not actually or presumptively benefited by an improvement to assessment to pay the cost of such improvement. It is often difficult, and sometimes impossible, to determine the exact limit to which such benefits extend; but, from the very nature of the subject, there must be authority somewhere to consider that question; and there is, perhaps, no safer mode of dealing with a question environed by such difficulties than to confide the power to the local government, to be exercised subject to supervision by the courts, where the peculiar facts of each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessments and taxation."

And see Nevin v. Roach, 86 Ky. 493, 5 S. W. 546. In Kelly v. City of Pittsburgh, 104 U. S. 78, 26 L. Ed. 659, Mr. Justice Miller said: "It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in the record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burden and fairness in their distribution among those who must bear them?" In Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. —, an appeal from the District of Columbia, it was said April 29, 1901, by Mr. Justice Shiras: "Special facts showing an abuse or disregard of the law, resulting in an actual deprivation of property, may give grounds for applying for relief to a court of equity; and this was thought by a majority of this court to have been the case in Village of Norwood v. Baker." So, in Baptist Church v. McAtee, 8 Bush, 517, 518, 8 Am. Rep. 486, 487, Judge Lindsay, speaking for the court, said: "The power to impose this character of taxation must to some extent depend upon the fact that the persons taxed are correspondingly benefited by the expenditure thereof. The courts would hesitate to interfere in cases in which it may be a question of doubt as to whether the persons taxed receive commensurate benefits; but, where the taxation is so excessive as to render it doubtful whether the property to be benefited will suffice to pay the assessment against it, they can no longer be deemed taxation. To enforce their collection would be the exercise of absolute and arbitrary power over the property of the citizen, —a power which, under our form of government, does not exist, even in the largest majority. Whenever such a case may arise, the courts will be prompt to afford protection."

The courts have gone very far in stating the effect of the presumption of the legislative determination of benefits resulting from such improvements, and have perhaps in some cases overstated it as conclusive. Such statements, however, that the legislative determination of benefit is conclusive, are always to be understood as made subject to the constitutional limitation recognized in the provision of the old charter of the city of Louisville, which is re-enacted in section 2834, Ky. St., and announced in Baptist Church v. McAtee, supra; Preston v. Roberts, 12 Bush, 570; Preston v. Rudd, supra; Frantz v. Jacob, 88 Ky. 525, 11 S. W. 654; Gleason v. Barnett (Ky.) 50 S. W. 67; and Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544,—in which is stated the position of the court as to the constitutional limitation. From that position we have never receded or been disposed to recede. See, also, Petter v. Allen (Ky.) 54 S. W. 174; City of Louisville v. Selvage (Ky.) 51 S. W. 447.

Barfield *v.* Gleason

Fourteenth Amendment.

Upon the authority of the opinion of Mr. Justice Harlan (Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443), an immense volume of argument has been devoted to the proposition that the Kentucky statute is violative of the fourteenth amendment to the constitution of the United States, in that there is no provision made by the statute for a preliminary hearing as to the extent of special benefits to each piece of property resulting from the improvement. An extended consideration of this argument has been rendered unnecessary by recent decisions of the supreme court of the United States in the cases of French v. Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. —; Wormley v. District of Columbia, 181 U. S. 402, 21 Sup. Ct. 609, 45 L. Ed. —; Allen v. Same, Id.; Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. —; Town of Tonawanda v. Lyon, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. —, —all rendered on the 29th day of April last, and to appear in 181 U. S. The contention in each of these cases seems to be that there must be some provision for a preliminary hearing as to special benefits to meet the requirements of due process of law. In each of those cases it was decided that such provision was unnecessary, and the doctrine laid down in Walston v. Nevin, 128 U. S. 581, 9 Sup. Ct. 193, 32 L. Ed. 546, was expressly reaffirmed. In that case the old charter of the city of Louisville was under consideration, of which the present act for the government of cities of the first class is, as to the matter under consideration, a re-enactment. In the opinion by Chief Justice Fuller it was said: "The statute has been repeatedly before the Kentucky court of appeals, which has sustained it as constitutional and proper legislation; the power vested thereby in the local government being subjected to the supervision of the courts, 'where the peculiar facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation.' Preston v. Roberts, 12 Bush, 570, 587; Beck v. Obst, 12 Bush, 268; Baptist Church v. McAtee, 8 Bush, 508, 516, 8 Am. Rep. 480. Unjust, unequal, or arbitrary burdens are not authorized to be imposed by the terms of the act, and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the courts, which are specifically authorized to 'make all corrections, rules, and orders to do justice to all parties concerned.'" The doctine was reaffirmed by the supreme court in French v. Paving Co., citing Spencer v. Merchant, 125 U. S. 356, 8 Sup. Ct. 921, 31 L. Ed. 763; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Davidson v. City of New Orleans, 96 U. S. 97, 24 L. Ed. 616; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; Parsons v. District of Columbia, 170 U. S. 45, 18 Sup.

Ct. 521, 42 L. Ed. 943; Cooley, Tax'n, 447; 2 Dill. Mun. Corp. § 752; and many other authorities. In the case of Wight v. Davidson it was said: "That it was not intended by this decision [Village of Norwood v. Baker] to overrule Bauman v. Ross and Parsons v. District of Columbia is seen in the opinion, where both of these cases are cited and declared not to be inconsistent with the conclusion reached." And in Town of Tonawanda v. Lyon it was said in the opinion by Mr. Justice Shiras: "It was not the intention of the court in that case to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the fourteenth amendment of the constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the fifth amendment against similar legislation by congress. The case of Village of Norwood v. Baker presented, as the judge in the court in the present case well said, "considerations of peculiar and extraordinary hardships, amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the fourteenth amendment."

Constitutional Provision for Compensation for Injury.

Section 242 of the constitution provides: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public uses, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction." This section is relied on as a defense to the assessment, or, if that cannot be done, as authorizing a recovery over against the city for the amount of the cost of the excavation made necessary by the change of grade of the street. It may be assumed that by a case of City of Henderson v. McCain (Ky.) 43 S. W. 700, 39 L. R. A. 349, it has been settled that a change of grade causing damges to abutting property is such an injury as is provided for by this section.

It is contended that no lien was created by the making of Catalpa street, that the whole proceeding was void, and that the city and the contractors were mere trespassers while doing the entire work. It may be conceded that, if the injunction had been applied for in proper time, the injury to the abutting lots might have been prevented until compensation had been made or secured for such injury. The fact that several of the appellants obtained damages against the city on account of the change of grade, several of which judgments have been affirmed by this court, would seems to show that there is no reasonable doubt of the fact of the injury. The question, however, is whether the remedy here sought is available. The

fixing of the present grade was accomplished before the ordinance was adopted providing for this improvement. The injury caused by the change of grade and the consequent excavation was undoubtedly recoverable against the city, but that is not the relief which is sought in this case. What is here sought is: First, that the ordinance providing for the work be declared absolutely void, because it was done upon the grade theretofore fixed by the council, and it is therefore claimed that there can be no recovery by the contractor, who performed the work in spite of the vehement protest of the property holders; and, second, that the cost of the excavation be apportioned among the property holders, and that each of them recover the amount apportioned to him against the city. We do not think that either of these contentions can be sustained. It may well be that the change of grade by the council might have been prevented by the injunctive process of a court of equity, or that the physical change by the excavation to conform to the grade fixed might in like manner have been prevented until compensation for the injury occasioned thereby had been provided. But we do not think it can properly be held that an ordinance providing for a public improvement is absolutely void, so as to leave the contractor who does the work without remedy, because the law under which the ordinance is enacted requires the work to be done in conformity with the grade theretofore established and the performance of the work in the manner required produces injury, compensation for which is not provided in the ordinance. Nor do we think appellants are entitled to recover of the city the cost of the excavation assessed against their property, and occasioned by the change of grade, as they have waited, not without earnest protest, however, until the work had been done; and it is obvious that the cost of excavation according to the contract is not the measure of their damages. The damages which they have suffered have accrued, are easily ascertainable, and the proper proceeding for their recovery now is an action at law for damages.

The authorities cited do not seem to us to sustain the proposition argued by counsel for appellants, viz. that a statute, whether of the state or municipality, which results in injury to property, is unconstitutional unless the statute itself provides for compensation to be made for the injury before it is done. The case of City of Covington v. Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, is cited as holding that such a statute failing to provide compensation is void. On the contrary, in that case the statute under consideration was held constitutional. The proposition there stated, that possession cannot be taken of condemned property until compensation made, is elementary. So, too, a statute which provided for taking property for public use without compensation would undoubtedly be unconstitutional. There is no trouble about that proposition. So, too, it might be that a statute which

provided for injury of private property for public use, or which provided for the doing of anything from which injury necessarily would result, would be held unconstitutional if it did not provide compensation for the injury. But the vast majority of statutes providing means whereby local improvements shall be made, whether, as in this case, they are general provisions contained in the charters of municipalities, or provide directly for the specific improvement, the courts cannot say that the statute will work injury in all or any of its applications; nor can such statement be predicated of an ordinance which merely determines that an improvement shall be made. In such cases the injury, prospective or existing, must be affirmatively shown by the party aggrieved. In this connection, see Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658.

Constitutionality of Section 2839, Ky. St.

"The board of public works shall make out all apportionment warrants for which liens are given for improvements of public ways. * * *" It is urged that this is a legislative function, amounts to the imposition of a tax, and cannot be performed by a body which in the act creating it is designated as an "executive board." The authorities cited by appellants upon this question do not seem to us to be at all applicable. The action provided for in the section is making out apportionment warrants. In cases where, as in the case at bar, the improvement is in a territory bounded by principal streets, the statute itself makes the apportionment in proportion to the number of square feet of land in each fourth of a square contiguous to the public way improved. When the ordinance is duly passed, the contract executed, and the work done, the cost of the work is by the statute apportioned among the lots in the quarter squares contiguous to the improvement. The mere making out of the apportionment warrants is purely clerical and ministerial, and may be properly performed by the executive board. If incorrectly performed, the errors therein may be corrected by the court. See Gosnell v. City of Louisville (Ky.) 46 S. W. 722. It is provided that interest shall not go until the warrants are issued by the board. This provision, we assume, is for the benefit of the property holder, that he may have notice of the exact amount to which his property is subject; and for this reason we held in Fehler v. Gosnell, supra, that, where the apportionment by the board is incorrect, interest does not begin to run until a correct apportionment is made by the court. This action of the board is in no sense the levy of the tax for the local improvement. The tax is levied by the statute when the ordinance is adopted, providing "said work shall be done at the cost of the owners of the ground as provided by law." The law itself directs the proportion in which the levy is made. See Richardson v. Mehler, this day decided. In most of the authorities cited by counsel that apportionment considered is

that defined by Cooley, Tax'n, p. 175, where it is said: "The apportionment of the tax consists in a selection of the subjects to be taxed, and in laying down the rule by which to measure the contribution which each of these subjects shall make to the tax. Apportionment is therefore a matter of legislation." It is evident that ordinary taxation is here referred to, and not special assessments for local improvements. The apportionment referred to in the quotation is that which we find in the revenue laws of the states where the various subjects of taxation are classified, and the rate of taxation upon each class fixed. Such definitions can have no application to a case like this, where all of this apportionment has been performed by the legislature, and where property to be taxed belongs entirely to one class, viz. the square feet of land in the quarter squares contiguous to the improvement. Such apportionment as is here provided for is purely clerical, and is so recognized in the cases of Baptist Church v. McAtee, 8 Bush, 516, 8 Am. Rep. 480, and Loeser v. Redd, 14 Bush, 20.

The Constitutionality of the Act for the Government of Cities of the First Class.

It is claimed, also, that all that portion of the act for the government of cities of the first class which provides for the original construction of public ways at the cost of abutting owners is unconstitutional, because there is no requirement in the statute for an approval by the city council of the contract for such construction; that in fact there is no provision of law requiring any contract to be approved by the council, except the provision in section 2822, Ky. St., which evidently refers to disbursements by the city out of its own funds; that the only power to let a street contract is contained in section 2829, and is by that section vested in the board of public works; and that this power is an essential part of the tax, and is that part of the procedure looking towards the imposition of the tax by which the tax rate is fixed. It is urged that the only proceeding which is required to be taken by the council in these matters is the enactment of the ordinance by which it is simply determined that the improvement shall be made; that the subsequent procedure, so far as the statute is concerned, is intrusted solely to the board of public works; that that board draws the specification, advertises the letting, opens the bids, awards the contract, executes the contract under the seal of the corporation, inspects and receives the work when finished, and apportions the cost among the property holders. The passage of the ordinance, says counsel, is but one step in the imposition of the tax; it determines that the improvement shall be made, and the law provides that it shall be done at the cost of abutting property holders, but that until the bidding is completed, and the rate thereby fixed, by fixing the amount to be raised, the imposition of the tax is not complete. And this is urged upon the ground that the fixing of the amount to be raised by taxation is a legislative

function, and cannot be performed by a purely ministerial body, such as the executive board. To this it may be responded that the question is not an open one in this state. In Baptist Church v. McAtee, 8 Bush, 516, 8 Am. Rep. 485, Judge Lindsay, speaking for the court, in response to a similar contention, said: "The general council is invested with legislative discretion in determining when and in what manner a particular street shall be improved, but in apportioning the cost of the improvement among those persons bound to pay the cost, as well as in accepting the contract under which it is to be made, its action is ministerial, and made subject to judicial revision when tainted with fraud, or when it is necessary for the correction of errors. The council procures the improvement to be made, and the legislative enactment to which the municipality owes its existence, unaided by any municipal ordinance, imposes upon the property owners the duty of paying their proper proportions of the expense thereby incurred." So, in Loeser v. Redd, 14 Bush, 20, in an opinion by Judge Pryor, it was said: "The city council orders the improvement, and the law provides the mode of assessment and the property to be assessed. In such cases, when a mistake has been made in the assessment, and a party owning property within the fourth of a square has paid too much, or been omitted from the assessment, or the council has gone beyond the fourth of a square in making the assessment, the courts have the right to correct the mistake or rectify the error, for the reason that the law, when the improvement is ordered, creates and fixes the liability. No discretion is left with the court or council as to the party to be charged, or as to the property to be taxed. The chancellor is only enforcing the law by requiring the property already selected as the subject for taxation in the particular case to pay it." So, in an opinion by Judge Paynter in Gleason v. Barnett (Ky.) 50 S. W. 68, it was said: "It is within the power of the general council, by ordinance, to declare where the improvement shall be made, and how it shall be made; but the general assembly has declared how the cost shall be apportioned when the territory is defined into squares by principal streets and that it shall be done by the board of public works." These authorities seem to us to apply, also, to the contention last considered.

It may be remarked that the contract appears to have been approved by both boards of the council and signed by the mayor, but we attach no importance to this fact. If compliance with the requirements of the statute, express and implied, does not create the lien, it cannot be created by unauthorized action of the council.

Warrants not Approved by the Council.

It appears that by general ordinance of the city approved June 26, 1894 (Ordinances of Louisville of November, 1895, p. 10), provision was made that the assessor should furnish

the board a list of the names of owners of property, and a description of the ground owned by each, and that when said list and description should be furnished, and the work received as completed, and apportioned by the board of public works, and approved by the general council and the mayor, the city should furnish warrants for the cost of the improvements against the owners of ground, and that the lien for the cost of the improvement should exist from the date of the approval of the apportionment by the mayor. It is insisted that, as the warrants here sued on were not approved by the general council or the mayor, no valid apportionment was made, and no lien ever attached. This contention cannot be sustained. It may be conceded that the city legislature had no power to require of its officials that they should do these things, but that requirement does not in the slightest degree affect the question whether the contractor acquired a lien under the statute. If the statute is constitutional and was complied with, the rights which it provided should attach upon such compliance became fixed thereby.

Annexation.

Upon the question of whether the portion of Parkland in which this improvement is situated was annexed to the city of Louisville, we think the record is conclusive, and cannot be overcome by the recollection of a witness. Indeed, the witness' statement that the ordinance was passed by both boards on the same night may be perfectly consistent with the proper passage of the ordinance by one of the boards at a subsequent date, which in Oswald v. Gosnell (Ky.) 56 S. W. 165, was held a sufficient compliance with section 2777, Ky. St.

Five-Years Guaranty.

We cannot concur in the contention for appellants that the five-years guaranty provided for in the general ordinance, which was referred to and made a part of the ordinances for the construction of the improvements, and also embodied in the contracts, avails to defeat a recovery. The guaranty clause of the contract has been construed by this court in Fehler v. Gosnell and Gosnell v. City of Louisville, supra. The contractor must be presumed to have contracted with reference to the legal construction of this provision as determined by the court. The judgment of the trial court conforms to the rulings of this court in the cases mentioned, and relieves the taxpayers of 10 per cent. of the cost of the improvement. And this, we are bound to presume, was a sufficient relief against any excessive cost occasioned by the insertion of the provision. Moreover, the evidence in the case tends strongly to support the conclusion that it was in fact ample for that purpose.

The Grade.

We do not fully understand the contention of counsel as to the fixing of the grade, in support of which he refers us to

Zable v. Orphans' Home, 92 Ky. 94, 17 S. W. 212, 13 L. R. A. 668. In that case it was held that there was no averment or evidence of the grade having been fixed. But it was, in addition, held that proper averments of the steps leading to the creation of a lien, supported by the exhibits required by the then existing statute to make out a prima facie case, entitled the plaintiff to a judgment in the face of a mere denial. The requirements stated in that opinion seem to have been met in this case. McHenry v. Selvage, 99 Ky. 232, 35 S. W. 645.

Was the Improvement Necessary?

Whether the improvement of Catalpa street was necessary is, we think, a matter committed solely to the determination of the council, subject to the limitations we have indicated. This doctrine seems to be abundantly supported by the cases of Preston v. Roberts, 12 Bush, 590, and Caperton v. Humpick, 95 Ky. 109, 23 S. W. 875.

Claim against City for Compensation for Release of First Contractor.

It appears that at the first letting this work was awarded to one McNaghton, who entered into a contract with good security; that after performing certain work in the same neighborhood, under like contracts, he became insolvent (it is claimed, by reason of the improper rejection of materials purchased by him to carry on the work), and made application for release from his remaining contracts, and that, although his surety was ample and sufficient, the board of public works recommended his release, and the council adopted a resolution rescinding the contract. There was a subsequent advertisement of the improvement, and the appellee Gleason was the lowest bidder. His bid was from 25 to 33 per cent. higher than the McNaghton contract. No award was made at that time, but at a subsequent letting the contract was awarded to Gleason on substantially the same bid that he had made at the time of the second advertisement. A judgment over against the city is asked by the appellants for the difference between the McNaghton contract and the bid upon which the contract was awarded to Gleason. Does this state of facts constitute a cause of action against the city? Upon this question the members of the court are not in accord, but the majority are of opinion that it does so, for the following reasons: The city of Louisville, in determining that Catalpa street should be improved, performed a legislative function. In advertising for bids under the ordinance making the award, executing the contract with the bidder, and requiring the performance of the work, it was, through its officers, executing a statutory power of attorney from the property holders. The contract was made with concededly good and sufficient authority. The council, on the recommendation of the board of public works, undertook by resolution to release the contractor and his surety from its fulfillment. There was here no exercise or

attempt to exercise legislative discretion a second time upon the question which had previously, in the exercise of legislative discretion, been determined, viz. whether the improvement was necessary and should be made. The extent of the council's power in that behalf, and the proper mode of their exercise, need not be considered here. Nor need we consider the powers of the council in a case where the contract is unenforceable either because of irregularity, or because of insolvency of the contractor and his surety. The contract here is conceded to have been valid and enforceable. It was one which the city council had no power by resolution to cancel, and subsequent events showed it was a highly advantageous contract. By the city's unauthorized action it cast upon the property holders the burden of the difference in cost between the work as provided for under the McNaghton contract and under the less advantageous Gleason contract. For this difference the property holders are entitled to a right of action, not against Gleason, who was required only to look to the validity of the ordinance which provided for the improvement, but against the city, by whose unauthorized action the burden was cast upon them.

But it is contended on behalf of the city that, if a right of action exists against it for the excess of cost of the Gleason contract over that of McNaghton, the proportion of that excess to which each of the appellants is entitled would not be as much as $200; that the right of recovery, if it exists, is to a personal judgment against the city in favor of each individual for his proportion of the excess, and not the aggregate to which all of the appellants would be entitled; and from this it is insisted that it follows that this court has no jurisdiction of the appeals against the city, under Oswald v. Morris, 92 Ky. 48, 17 S. W. 167. But the majority of the court are of the opinion that as the right of recovery grows out of the ordinance and contract, whereby a lien has been imposed upon appellant's lands, and as the court has jurisdiction of the appeal from the judgment enforcing that lien, which, under the statute, is enforceable in a single suit against the lands of all, it should retain jurisdiction of the appeals in so far as it may be necessary to do justice between the parties. This seems to be sustained by Rickets v. Hamilton (Ky.) 29 S. W. 736. Moreover, the total claim against the city of each appellant seems probably to be sufficient to give jurisdiction.

From this it follows that the judgments in favor of Gleason and Bitzer are affirmed, and the judgments in favor of the city are reversed, with instructions to enter judgments in conformity with this opinion.

GUFFY, J., dissents.

HERMAN *v.* CITY OF OCONTO.

(*Supreme Court of Wisconsin, June 20, 1901.*)

[86 N. W. Rep. 681.]

Contract with City—Fraudulent Procurement—Submission of Special Question.—Defendant alleged that the contract to construct a sewer was secured by fraud, bribery, and corruption. The court submitted to the jury the special question whether, at or about the time the sewer contract was entered into, the contractor or his agent paid any money to any member of the board of public works for the purpose of corruptly influencing the official action of such member, which the jury answered in the negative. The evidence showed that a lawyer employed by the original contractor bought refreshments for the members of the board of public works, and was active in securing the contract. The work was completed by plaintiff, as security of the original contractor, after the latter had abandoned it, and there was no evidence as to when the city discovered the alleged bribery. *Held*, that the submission of the special question was not prejudicial to defendant, on the ground that it was not broad enough to cover the questions raised by defendant's evidence.

Municipal Finances—Assets and Liability—What Constitutes.—A city borrowed $35,000 from the state to erect a high-school building, and, at the time plaintiff contracted to build a sewer for the city, $24,000 of the borrowed money was in the city treasury, and the school building was in process of erection. *Held*, that the fact that there was no evidence of any contract for the school building, or of its probable cost, did not justify including the $24,000 as an asset of the city, in calculating whether the city's indebtedness, including plaintiff's contract, exceeded the constitutional limit.

Same—Same—Same.—Where plaintiff contracted in October to build a sewer for the defendant, taxes which had been apportioned by the secretary of state, but which could not be enforced against the property liable therefor until the following December, could not be considered as an asset of the city, in calculating whether its indebtedness, including plaintiff's contract, exceeded the constitutional limit.

Municipal Indebtedness—Constitutional Limitation—Calculation.*—A deduction of damages for a city contractor's failure to complete the work within the time specified could not be subtracted from the amount due on the contract, in determining whether the city's indebtedness, including the sewer debt, exceeded the constitutional limit.

Same—Same—Same.—Where a city had contracted to pay a certain sum per annum for a water supply for 30 years, and a certain monthly sum for electric lights, and certain monthly amounts for teachers' wages, and nothing was due on any of the contracts at the time plaintiff entered into an agreement to build a sewer for the city, the amount of such contracts cannot be included as liabilities against the city, in determining whether its indebtedness, including plaintiff's contract, exceeded the constitutional limit.

Same—Same—Same—Interest.—The defendant city borrowed a sum from the state to erect a high-school building,—the amount to be paid back in 30 annual installments,—and had other outstanding interest-bearing bonds. *Held*, that the contention that interest should be calculated for the entire 30 years, and on the bonds for the entire time they were to run, in determining the amount of the city's indebtedness, to ascertain if the constitutional limit had been exceeded, could not be sustained.

Same—Same—Application.—Const. art. 11, § 3, provides that no city shall become indebted, including existing indebtedness, in the aggre-

*See Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 721, and extensive *note*, p. 725.

gate, exceeding 5 per cent. of the value of the taxable property, and that any city incurring any indebtedness shall provide before or at the time of doing so for the collection of a direct tax sufficient to pay the interest on the debt as it falls due, and to discharge the principal within 20 years. *Held*, that a contract for a sewer system, payable within one year, without interest, was not void because no provision was made at the time the contract was executed for the collection of a direct tax to pay it, since the constitutional provision applies only to interest-bearing contracts extending over a term of years.

Municipal Taxation—Constitutional Limitation—Exception.—Laws 1882, c. 56, subc. 5, § 2, provides that the common council of the defendant city shall annually levy on its taxable property, to defray current expenses, a tax not exceeding one-half of 1 per cent. and for all other purposes, except for schools, bridges, and the payment of the principal and interest of any outstanding debt or obligation, shall levy a tax not exceeding one-half of 1 per cent. *Held*, that a contract to build a sewer was not void because a levy therefor would increase the current expenses of the city beyond one-half of 1 per cent. on its taxable property, since the building of a sewer system was not a current expense, but constituted an outstanding obligation, within the exception of the statute.

Municipal Indebtedness—Contract Exceeding Constitutional Limit—Validity.—Plaintiff contracted to build a sewer at so much per foot, depending on the size of the material used on different streets, and at so much for constructing the manholes; and, as executed, the contract amounted to $18,099, and, including that amount, the city's indebtedness exceeded its constitutional limit by $228. *Held*, that the contract would be declared valid up to the constitutional limit, and invalid as to the excess, since the contract was divisible.

Appeal from circuit court, Sheboygan county; Michael Kirwan, Judge.

Action by Henry Herman against the city of Oconto. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Modified.

The facts in this case are quite fully stated on the former appeal (100 Wis. 391, 76 N. W. 364), where it was held that the complaint stated a good cause of action, and that the answer was sufficiently definite to permit the introduction of evidence in relation to the issue of fraud, bribery, and corruption therein presented. A second trial was had. By stipulation the complaint was amended to the effect that, after the contract in suit was made, the plaintiff agreed with Turner to make advances for carrying on the work; that, after the work had been partially done, Turner's interest was sold to plaintiff, and notice given defendant; that plaintiff was induced to make advances and to complete the work on the faith that the contract had been fairly let; and that he had no knowledge of any claim that it had been obtained by any improper means. The answer was also amended, setting up a contract between the city and the Oconto Water Company for a water supply, continuing for 30 years from July 9, 1890, at an annual rental of $6,500 for one hundred hydrants, and $50 a year for additional hydrants. It also alleged that on January 1, 1894, the city borrowed from the state $35,000, payable, with interest, in 20 years, at the rate of $1,750 and at the time the contract was made, October 22, 1894, there

was interest accrued thereon, and payable January 1st thereafter, amounting to $1,750. It also alleged other indebtedness of the city as follows: Electric light company, $4,014.50; city hall and engine house bonds, $3,000; current expense and city orders, $10,000; other state, county, etc., indebtedness, $5,000,—making the total indebtedness of the city over $65,000, which was in excess of the 5 per cent. limit. The place of trial was changed to Sheboygan county. At the trial a further amendment was made to the answer, to the effect that at the time the said contract was made no tax levy was made to discharge the indebtedness thereby created, as required by section 3, art 11, of the constitution; that the city was without funds; and that the city had no power under the charter to incur such indebtedness under its charter. It was agreed that the only issue that should be submitted to the jury was the one that arose upon the allegations of the answer relative to Turner's securing the contract by improper means; the other issues to be determined by the court. Pursuant to this arrangement, the jury rendered the following special verdict:

"First Question. At or about the time when the sewer contract in suit in this action was entered into by the city of Oconto with William Turner, did the said Turner and one Paul J. Foley, or either of them, pay or cause to be paid any money to any member or members of the board of public works of said city for the purpose and with the intent thereby to bribe such member or members, and to corruptly influence their official action in letting or awarding, or in reporting to the city council in favor of the letting or awarding, of such contract to said Turner? Answer. No."

The court rendered a lengthy written decision, and made findings showing the city's assets and liabilities at the date of the contract as follows:

School loan from state		$35,000 00
City hall and engine house bonds and interest		3,030 00
City orders outstanding		4,009 00
Officers' salaries, for fire department, support of poor, etc.		609 32
Electric light		628 35
E. L. Shaw, $75 and $133.33		208 33
Sewer contract sued on		17,323 01
Total		$60,808 01
From which should be deducted:		
County order on hand	$667 00	
Cash in contingent fund	94	
		667 94
Balance of indebtedness		$60,140 07

Constitutional debt limit, $60,687.75.

As regards the first item mentioned, the court found that said sum was borrowed from the state on April 6, 1894, and that it was payable in 20 annual installments, of $1,570, with 5 per cent. interest in addition, on January 1st of each year; that the city received said sum on May 31, 1894, less the advance interest up to January 1, 1895, and that it was borrowed for

the purpose of building a high-school building; that on October 31, 1894, there was yet in the high-school building fund $21,433.34; and that the building was then in the course of erection. No proof was offered and no finding made as to any contract relative to the erection of the high-school building, or of its probable cost. As regards the city hall and engine house bonds, the court found there were outstanding bonds amounting to $3,000, of which $2,000 became due, with 6 per cent. interest, August 18, 1895, and $1,000 and interest August 1, 1896. The interest had been paid to August 1, 1894. In his computation of indebtedness, the court included interest earned, but not due, on the bonds, to the date of the contract, amounting to $30. The evidence showed total outstanding city orders, $4,100. The court disallowed orders amounting to $91, as being void, having been issued for an unauthorized purpose. The court found that in August, 1893, the city made a contract with the electric light company to light the city for three years at a stated price per light, payable at the end of each month. The sum above mentioned is the amount of the bills for lighting for October and November, 1894. As regards the Shaw indebtedness, it appears that the city owed him $75 for services. Early in October the city entered into a contract with him to superintend the construction of the sewer to be built, and was to pay him for the time so engaged at the rate of $1,600 per year, at the end of each month. He began work November 1st, and the $133.33 above mentioned is for his services for November. Under the contract in suit, the total amount of the work, at the price agreed upon, was $18,099.66. At the close of the work the next year there had been some delay, and under the terms of the contract the city made a deduction at the time of settlement of $776.65 as liquidated damages. The court found the amount of the indebtedness created by the contract of October 22d to be the difference between these two sums. At the time the contract was entered into, the city was under contract, by ordinance, with the Oconto Water Company, for a water supply, running 30 years from July 9, 1890, at an annual hydrant rental of $6,900, payable January 1st and July 1st of each year. All installments had been paid up to July 1, 1894. The ordinance provided that payments should be met by a direct annual tax. The court found that the city was not then indebted under said contract. It further appears in the case that the city was under contract with divers teachers of its public schools for a period of 10 months, beginning September 1, 1894, the monthly pay roll therefor being $920. All wages had been paid up to the time the sewer contract was entered into, and there was over $1,600 yet left in the school fund. The court found no indebtedness under this contract. The value of the taxable property of the city, upon which the computation of the limit of indebtedness must be based, was found to be $1,213,755. At the time the sewer contract was

entered into, no provision for the collection of a direct annual tax to pay the liability thereby created was made. Upon the findings so made, the court directed judgment for plaintiff. Both parties filed numerous exceptions. A motion by defendant for judgment, and, if denied, for a new trial, was denied, and from the judgment entered on the verdict and findings the defendant has taken this appeal.

P. H. Lynch and Wigman & Martin, for appellant.

Hoyt & Olwell and Greene, Vroman, Fairchild, North & Parker, for respondent.

BARDEEN, J. (after stating the facts). We desire to enter our earnest protest against the printed case in this action. It is inexcusably long. It is padded with matter entirely foreign and unnecessary to an understanding of the questions presented for decision. The judge's charge, findings, and exceptions are printed twice. Nearly 30 pages of exhibits to the complaint are printed in full; numerous bonds, orders, stipulations, and proceedings on the former trial are set out at length; and yet no question is raised as to any of them. Five pages are taken up with the cost bill and affidavit of attendance of witnesses, neither of which is questioned. In fact, the printed case seems to be a copy of the record, duplicated in some particulars. It was entirely unnecessary, and constitutes a flagrant violation of rule 8. We acquit the learned counsel who argued this case for appellant of any part in its preparation, and trust that the guilty one will never repeat his offense.

Many troublesome and interesting questions have been presented and ably argued. We have given them our fullest consideration, and the result had been reached only after careful study and investigation. The conclusion reached renders it unnecessary to consider several of the most interesting questions raised.

The defendant's first contention is based upon the claim that the contract sued upon is void, as having been secured through bribery and corruption of some of the public officers charged with the duty of letting the contract. Let us first ascertain the issue presented by the answer on this question. It charges "that the contract was secured * * * by means of fraud, bribery, and corruption, in payment to certain of the members of the board of public works, * * * whose names are to defendant unknown, large sums of money, intended to corrupt and influence, * * * and which did corrupt, influence, and control, the acts and conduct of the said members in letting and executing said contract." Upon the issue thus presented, the court submitted to the jury the question set forth in the statement. No one can doubt but that the finding is as broad as the allegation. It was adverse to the defendant. This does not satisfy defendant's counsel. They insist that the issue should have been broadened to

meet certain phases of defendant's evidence, which it is claimed warrant it. In the first place, it should be kept in mind that the controversy here is not between the original parties to the contract. The plaintiff came in as surety, took up the contract, and expended large sums for its completion. No proof is offered as to when the alleged bribery was discovered by the city. The city has received and retained its system of sewers, which cost considerably more than the contract price. The good faith of the plaintiff in the matter is not challenged, so that there is no superior equity in favor of the city on the face of the situation. The circumstances are not such as to show that defendant was entitled to any great latitude under its pleading, especially since its paucity of allegation was criticised on the former appeal. Under its charter, the defendant was to let the contract to the lowest reasonable, responsible bidder. The two lowest bids, differing but slightly in amount, were put in by Forrestal and Turner, the former's being the lowest. Before attempting to award the contract, the board had an investigation of the standing of the two bidders made by the city engineer. He reported that Forrestal was not a desirable person to contract with, and that Turner was considered an honest man and a good workman. It is nowhere suggested that the engineer was influenced or corrupted by the illicit funds in circulation. Acting upon this information, the board rejected the Forrestal bid. Turner was left the lowest bidder, and he was reported worthy. He was awarded the contract. The complaint is that a certain lawyer retained in his interest used improper means to secure such award,—not that he paid out any money, as alleged, to influence official actions, but that he bought some of the members refreshments, and was distinctly active in securing such award. The testimony offered does not sustain the charge in the answer, and circumstances are not so flagrant that we can say the court ought to have gone beyond the direct issue made by the pleading. The record shows that this branch of the case was fairly presented, the verdict is within the allegations of the answer, and we perceive no reason for disturbing the jury's finding.

An important question, under the allegations and proof, was whether the alleged contract increased the city's indebtedness beyond the constitutional limit of 5 per cent. The court found that it did not, and this finding has been attacked with great vigor. To cover all of the questions raised would prolong this opinion to interminable length. We shall notice only those of chiefest importance, and which are deemed decisive of the case.

First as to the question of fact: The city's limit of indebtedness was $60,687.75. The main item of the city's indebtedness was a loan from the state of $35,000, obtained for the erection of a high-school building. The money was received by the city in May, 1894; and, at the time the sewer contract

was made, the court finds the city had $21,433.34 of this fund still in its treasury, and that the building was in course of erection. No proof was offered that any contract had been let for the building of the school house, or as to its probable cost. The plaintiff insists that, in absence of such proof, the court must consider the sum on hand an asset, and deduct it from the city's indebtedness. It would have been more satisfactory if some definite proof as to the cost of the school building, or the contract in relation thereto, had been produced. But the money was borrowed for a specific purpose. Under the law, it could not be used for any other purpose without the consent of the commissioners. The building was in the course of erection when the contract in suit was made. Under these circumstances, the inference is warranted that the city continued the building to completion. Municipalities are not given to borrowing more money than they need. The money having been borrowed for a specific purpose, the presumption is that it was needed and used for that purpose; and we cannot assume there will be a surplus, in absence of proof, or that it has been diverted to other uses.

The argument of plaintiff that the annual apportionment of taxes made by the secretary of state under section 1070, Rev. St. 1898, to pay the installment due the state January 1st following, made the taxes so levied "in process of immediate collection," so as to make them assets, cannot be sustained. It was not a levy upon the property of the municipality. It was not until December 4th that the various levies were in such form as that they could be collected and enforced from the property liable thereto. At that time the proper tax roll was put in the collector's hands, and the tax was then enforceable, regardless of the will of the taxpayer. Not until that time arrived could the amounts so levied be considered an asset. Rice v. City of Milwaukee, 100 Wis. 516–521, 76 N. W. 341.

The contract in suit was not for a definite sum. It bound the contractor to build sewers on certain streets, according to the plans, at certain prices per foot for different sized pipes, and at varying prices for other materials, manholes, etc. The contractor was also to do extra work as directed by the engineer, on the basis of 15 per cent. advance of actual cost. The city reserved the right to vary, diminish, or extend the work. On July 24, 1895, the plaintiff and the city officers got together and made a settlement. They found that there was due for the work done $18,099.69. From this sum the city deducted $776.65, as damages sustained by the city for failure to complete the contract within the time limited thereby, leaving a balance due plaintiff of $17,323.01. The trial court held that this difference was the amount the city agreed to pay under the contract, and was the amount that should be taken into consideration in ascertaining the city's indebtedness at the date of the contract. With this conclusion we cannot agree.

The damages allowed were not in contemplation when the contract was made. It is true, the parties stipulated that damages should be paid in case of delay, but that sum was wholly unascertained and unascertainable at that time. It might be nothing, or it might have greatly exceeded the sum subsequently agreed upon. The real question is, what sum did the city bind itself to pay in case the contract was carried out and the sewers were built? No data are furnished by the contract itself from which the exact amount could be computed. That being so, we are bound to assume that the actual amount of the city's debt on the contract was the amount settled upon as having been earned by the contractor or his assignee, and not the difference between that amount and the damages allowed the city. Culbertson v. City of Fulton, 127 Ill. 30–36, 18 N. E. 781. Upon this basis, it will be observed that the city's total indebtedness at the date of the contract, inclusive of the sum earned thereon, and less available assets, was $60,916.72, or $228.97 more than the constitutional limit. Stating the situation in another way, the city might contract for the construction of sewers to an amount not exceeding $17,870.69 without exceeding the limit. Its contract exceeded that sum by the amount stated, and, unless the situation is such that it may be scaled down within the limit, the contract was void. That question will be discussed further along in this opinion.

Another important question in this connection is raised by defendant. It appears that in 1890 the city contracted by ordinance with the Oconto Water Company for a water supply for a period of 30 years, and that the annual rental at the date of the sewer contract was $6,900, payable on the 1st days of January and July of each year. Also in August, 1893, it made a contract for three years with the electric light company for city lighting at certain prices per light, payable at the end of each month. Nothing was due upon either contract at the time the sewer contract was made. As to the first contract, the court held there was no indebtedness under it. Under the second contract, the court allowed the October and November light bills as debts on October 22, 1894, on the ground that there was no money in the treasury at the time they became due. The defendant challenges the court's conclusions, and claims that the indebtedness for a hydrant rental and electric light for the entire period the contracts were to run should be considered, in computing the city's indebtedness. It is also claimed that the wages of teachers for the entire period covered by their contracts should be considered in like manner. The question seems to be deemed an open one in this state, notwithstanding Stedman v. City of Berlin, 97 Wis. 505, 73 N. W. 57, and many pages of the brief are taken up with a discussion of the principle and the authorities. We deem the Stedman Case decisive against defendant. The point was directly involved, and was dis-

posed of by the following language, in answering a claim similar to the one here made: "It is entirely well settled that this claim is unfounded in law. Where a municipality contracts for annual services for a series of years, to be paid for by annual payments, such contract does not come within such prohibition. In such case the whole amount which may ultimately become due does not constitute a debt, within the meaning of the constitution. To that end, regard is to be had only to the amount that may become due within a certain year or other period. 1 Dill. Mun. Corp. § 136a, and cases cited." This is substantially the holding of the courts in a number of states with a constitutional or statutory limitation similar to our own, as may be noted in the following cases: City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; City of Laporte v. Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; Grant v. City of Davenport, 36 Iowa, 396; Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, 70 N. W. 739; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; City of East St. Louis v. East St. Louis Gaslight & Coke Co., 98 Ill. 415, 38 Am. Rep. 97; McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794; Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769. It is true there are a number of cases in other states in conflict with this view; but, however debatable the ground, we see no good reason for receding from the position taken in the Stedman Case, and hereby affirm and declare that to be the law of this state.

Another claim made is that, in ascertaining the city's indebtedness, interest should be computed on the state loan and outstanding bonds for the entire period they are to run, and added to the principal. This is upon the theory that, when interest is expressly reserved in a contract, it becomes a part of the debt. See Perley, Int. 5; Redfield v. Iron Co., 110 U. S. 174, 3 Sup. Ct. 570, 28 L. Ed. 109. But is it a debt before it is earned? If so, then the most of the cases in the books relating to the ascertainment of municipal indebtedness have been wrongly decided. In Crogster v. Bayfield Co., 99 Wis. 1, 74 N. W. 635, 77 N. W. 167, the limit was $257,440. The bonds issued amounted to $240,000, running 20 years, at 5 per cent. interest. A glance at the case of Rice v. City of Milwaukee, 100 Wis. 516, 76 N. W. 341, reveals the fact that, if this theory were to be adopted, the city of Milwaukee would have been indebted many hundred thousand dollars beyond the debt limit. Turn to almost any case in the books, and on this basis the limit had been passed. Such a construction of the law would avoid the greater part of the indebtedness of the municipalities of this state. Interest is not a debt, within the meaning of the constitution, until it is earned and

becomes due. When the money was borrowed the city became indebted for the principal sum stated, and agreed to become indebted each year in the future to a sum equal to the interest thereon. Any other construction would lead to most startling results. Many business men and corporations could be forced to the wall if the interest they had agreed to pay on loans made was to be considered a present indebtedness. Men who had reported their financial standing to obtain credit could be called to account for not having taken into consideration their interest obligations which were to become due at some time in the future. There would be no end to the complications that might arise, and not the least would be the overturning of municipal obligations already incurred. The only case which in any way supports the theory in question is Coulson v. Portland, Fed. Cas. No. 3,275, which denied the right of the defendant city to issue interest coupons to railway bonds payable half-yearly through a period of 20 years. We decline to follow it. Interest rests upon much the same grounds as contracts for light and water. There may exist an obligation to pay, but, under the constitution, the indebtedness as to interest comes into existence each year as the obligation matures. It cannot be said to be a present indebtedness, under any reasonable construction of the constitution. See Dively v. City of Cedar Falls, 27 Iowa, 227.

Another question of difficulty and importance arises upon the contention that the contract is void because at the time it was entered into no provision was made by the city for the collection of a direct annual tax to pay it, as required by section 3, art. 11, of the constitution. The original charter of the city gave the council power to build sewers and pay the expense out of the general fund. The city attempted to adopt some of the provisions of the general charter law which would enable it to charge a portion of the expense to adjacent lot owners. The contract in suit was entered into upon the supposition that such authority existed, and provided that, at the city's option, payment might be made in city orders, special assessment certificates, or improvement bonds. The work was to be completed before February 25, 1895, and the last payment was to be made at the expiration of six months from the final estimate. Upon the former appeal it was determined that the attempt to adopt the general charter provisions had failed. On the one side, it is insisted that the city was bound to pay as its charter provided,—out of the general fund. On the other, the claim is that it was the duty of the city, before or at the time of the incurring of said indebtedness, to provide for the collection of a tax to pay the same, and, failing so to do, the contract is void. This involves a construction of the constitutional provision before referred to, which is not entirely free from difficulty. It must be observed that section 3 is a restriction on the power of the cities, not a grant of power. It should be reasonably con-

strued, and so as not to lead to absurd results. It should receive a sufficiently liberal construction to carry out its evident purpose, and at the same time with such a reasonable degree of strictness as not to cripple municipalities in the exercise of their usual functions. No stretch of construction should be indulged in, to reach cases not reasonably within its terms. It is not a question of inconvenience or hardship, on the one hand, or harsh and technical outreaching, on the other. We are powerless to add to or alter its provisions, and ought not to attempt to evade its clear and imperative commands. The effort must always be to construe it in view of the mischief aimed at, and in such a reasonable way as to prevent unnecessary hardships or absurd or irrational results. So much of said provision as is important in this litigation is as follows: "No * * * city * * * shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein. * * * Any * * * city * * * incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." These provisions were added to the original section by amendment in 1874. The mischief to be prevented was the creation of excessive debts for local improvements, public works, or the loaning of municipal credit, so payable that the burden should not fall upon those who contracted the obligations, or on their revenues, but on posterity. To do this effectually, it was found necessary to fix a limit on all indebtedness. This was to check the prodigality of municipal officers. The further to prevent them casting the burden upon posterity, they were required to pay the interest annually, and the principal within 20 years, and to make timely provision for the imposition of an annual tax for that purpose. There can be no doubt but that the provision is imperative and mandatory as to a debt coming clearly within its purview. We need not consider whether a failure to do so would render the debt void, or whether it was a mere provision for the protection of the creditors, and might be waived by him, as contended by plaintiff's counsel and held by the trial court. We will consider only whether it was ever intended to be applicable to such a contract as the one in suit. It bore no interest. It was payable within a year. It possessed none of the mischievous attributes against which the amendment was directed. Waiving for the time being the question of charter limitations, it stood upon no different ground than any debt the city might create for a municipal purpose, without money in the treasury. It is conceded that the city had no funds on hand with which to pay the contract price. In such case,

according to the defendant's contention, the city is powerless to incur any debt. It cannot even purchase a bottle of ink or a postage stamp unless it provides for its payment by voting a tax. It is said that the words "incurring any indebtedness as aforesaid" refer, by necessary relation, to any indebtedness "for any purpose to any amount," mentioned in the preceding sentence, and thus prevent the incurring any debt of any kind without raising a tax to meet it. The argument is plausible, but it leaves out of sight not only the mischief sought to be prevented,—the burdening of posterity by a debt,—but also fails to give any significance to the idea embodied in the latter clause that the tax is to pay interest and the principal within 20 years. These words are significant, and serve to identify and give essence and character to the indebtedness had in mind by the framers of the amendment. They indicate with certainty that the indebtedness against which a tax must be levied is one bearing interest, the time of payment of which has been extended over a series of years, and more than one year. A contrary view would lead to the palpable absurdity of requiring the city, if temporarily out of funds, to levy a tax for every item of debt it created, whether payable out of current revenues or not. Such a construction is not necessary to carry out the purpose of the provision, and we cannot assent to its adoption. Our conclusion is that debts for the ordinary running expenses of a city, and debts within the power of the city to contract, payable within a year out of the incoming revenues, actually levied or in good faith intended to be levied, are not such as are comprehended within the last clause of the constitutional provision quoted. If, however, the debt is made to mature at such a time as would make it a charge upon the future resources of the city beyond the period stated, then the levy of the tax is necessary to its validity.

Finally, the defendant claims the contract is void because the city had no power under its charter to levy a tax to pay for the sewer. This is based upon section 2, subc. 5, c. 56, Laws 1882, which provides, "The common council of said city shall annually levy upon the taxable property of the city to defray the current expense of said city, a tax not exceeding one half of one per cent., and for all other purposes, (except for schools, bridges and the payment of principal and interest of any outstanding debts or obligations of said city) a tax not exceeding one half of one per cent. upon all the taxable property of said city." The view we have taken of the question renders it unnecessary to discuss or decide whether the limitation on the power to raise taxes is such a limitation on the power to contract, and would render a contract void that was in excess of the limit to raise taxes for any one year. See Howard v. City of Oshkosh, 33 Wis. 312; Stedman v. City of Berlin, 97 Wis. 505, 510, 511, 73 N. W. 57. It cannot be said with any show of right that the building of a sewer

system is a current expense. While it is not easy to accurately define what may be included under that head, still it is plain that it must be limited to such as are necessary to carry on the city government,—such as are usual and ordinary from year to year. The second limitation excepts outstanding debts and obligations. The sewer contract was within the power of the city to make, and to pay out of the general fund. It was an outstanding obligation, and came within the exception stated. Section 17 of sub chapter 6 of the charter, which says that the council shall levy taxes for the several purposes mentioned, "but not exceeding the authorized percentage, particularly specifying the purposes for which the same are levied," only makes the percentage limit apply to such items as are mentioned in section 2. Any other construction would make the two provisions repugnant to each other, and lead to manifest absurdity.

We now come to the question of whether the contract is such a one as may be scaled down within the constitutional limit. The cases upon this subject are not entirely harmonious. The rule is that stated in 15 Am. & Eng. Enc. Law, 1136: "Generally only that part of the indebtedness incurred which exceeds the constitutional limit will be held void." In McPherson v. Foster, 43 Iowa, 48, 22 Am. Rep. 215, the defendants contracted to build a school house, and to receive bonds of the district to the amount of $15,000. By reason of prior existing indebtedness, the district could only contract an indebtedness amounting to $2,057.50. The bonds all bore the same date, and were issued, though at different times, as a part of one transaction. The court held that each bond was void to a sum proportional to the excess, and valid as to the remainder. In Stockdale v. School Dist., 47 Mich. 226, 10 N. W. 349, Judge Cooley wrote the opinion sustaining bonds issued by the district up to the limit, following the McPherson Case. Culbertson v. City of Fulton, 127 Ill. 30, 18 N. E. 781, was a case in which the defendant contracted for waterworks. The contract exceeded the limit a little more than $1,100. It was held that the contract to the extent of such excess was void, and valid as to the remainder. The same court quotes from the McPherson Case, in City of Chicago v. McDonald, 176 Ill. 404–414, 52 N. E. 982, and concludes that the view of the law taken by the Iowa court was "the correct one, and certainly reasonable and just." The supreme court of Indiana discusses a similar question in School Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81, and arrives at the same conclusion. In Catron v. Lafayette Co., 106 Mo. 659, 17 S. W. 577, the court said that when bonds were issued at different times, under an act limiting the total amount to be issued, the fact that bonds were afterwards issued beyond the limit did not invalidate such bonds as were issued before the limit was exceeded. In Francis v. Howard Co. (C. C.) 50 Fed. 44, the defendant had authority to issue

its bonds to the amount of about $15,000. It issued bonds aggregating $35,000, and delivered them at one time. The court held that bonds to the extent of its power to issue became a valid indebtedness against the county. Bonds in excess of the limit were invalid and uncollectible. The rule adopted in the Iowa case was applied, and each bond was scaled down proportionally. The supreme court of Texas adopted the same rule, saying: "If all of the bonds under the first ordinance were delivered at the same time, so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds." Citizens' Bank v. City of Terrell, 78 Tex. 450, 14 S. W. 1003. Another case often cited is Daviess Co. v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026. Bonds to aid a railroad company to the amount of $250,000 were authorized, payable in blocks, in 5, 10, 15, and 20 years. Bonds were issued in each class in excess of the right to issue, and delivered at different times. Each class had distinct letters, and were numbered in series. The over issue was declared void, and, in determining which were valid and which invalid, the court said that the test was, "Which were first delivered?" The bonds first delivered, up to the amount authorized, without regard to classification, were valid. Those in excess of such authority were void. In Hedges v. Dixon Co., 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044, the question involved was whether parties holding the greater part of a series of bonds issued in excess of the limit fixed by a state constitution could proceed in equity to ascertain the amount of such excess, and have each bond scaled down to the limit thus ascertained. Stress was laid on the fact that the bonds in question were issued as a donation to a railroad company, and, the holders not having paid any consideration to the county, no equity was raised against it for the amount represented by the bonds, or any part thereof. The court said: "What the county authorized and carried into execution in the present case, both by the vote and by the donation, was one entire transaction; and, if it should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it would be something different from that which was voted by the county, and carried into effect by the issue of the bonds. This would involve the making of a different donation from that which the county voted and intended to make to the railroad company." A further proposition decided was that the contract as to the bonds being void at law, for want of power to make it, a court of equity had no jurisdiction to enforce such contract, or to so modify as to make it legal, and then enforce it, in absence of fraud, accident, or mistake. In Board v. Standley, 24 Colo. 1, 49 Pac. 23, the principle stated in the foregoing case was recognized, and held not applicable to funding bonds issued in exchange for valid county warrants,

although the entire series of bonds was in excess of the constitutional limit. The only case in this court where this question has been considered is Cogster v. Bayfield Co., 99 Wis. 1, 74 N. W. 635, 77 N. W. 167. The action was by a taxpayer to set aside an issue of bonds by the county in aid of a railroad amounting to $240,000. The proposition submitted to and accepted by the county was for the construction of the road in six distinct sections, and the bonds were apportioned and delivered as each section was completed. The entire issue of bonds exceeded the constitutional limit by something over $15,000. The bonds to be issued for the completion of the last section of the road amounted to $25,000. On the ground that the proposition was, in a degree, several and apportionable, this court held that the issue of bonds upon the completion of the first five sections of the road was valid, and for the last section invalid. It will be observed that a number of the cases referred to hold the bonds or contract attacked void up to the limit to which the municipality might legally go, without reference to the question whether the transaction was divisible or not. The others proceeded upon the principle that, where the transaction or contract is divisible or separable, it is valid up to the limit; otherwise, not. The plaintiff urgently insists that the contract in suit is of such a nature that the court may properly hold it valid to the extent to which the city was at liberty to contract. So far as considerations of equity are concerned, the city has not a foot to stand upon. It has received and retains a sewer system costing nearly $20,000. It has paid no part of the cost. It would be absolutely valueless to the contractor. Except that the amount earned on the contract exceeded the debt limit, it was bound absolutely to pay for what it received. The city had authority to contract for the sewer, within a few dollars of the price stipulated. It has received all the benefits of the contract, and should pay the price, unless some legal stumbling block is in the way. We have already adverted to the terms of the contract. In a sense, the transaction was entire. There was an engagement on the one side to perform, and on the other to pay. In this view, the engagement in the Crogster Case was entire. But here the contractor agrees to build a certain number of feet of sewer of a given size of pipe on one street, a certain number on another, and more on other streets, of varying sizes. He is to receive a stipulated price per foot for each size of pipe on the different streets set out in detail in the contract. He is to put in manholes and catchbasins at agreed prices. He is to use lumber, and be paid at a certain rate per 1,000 feet. His work is under the control of the board of public works, who have power to vary, diminish, or alter the work. It is impossible to tell from the written contract itself how much the actual contract price would amount to. It is only by computing the length of streets in connection with the plans that an approx-

imate idea of the total cost can be arrived at. The plans were made a part of the contract, but they do not seem to have been brought into the record. The contract divides the sewer into several districts, the last one mentioned covering but three sheets. Under these circumstances, we are of the opinion that the transaction is of such a nature as that it may be served and held valid up to the limit which the city was authorized to contract. Its divisibility depends upon the separable character of the work to be done. If the plans had been brought into the record, so that we could have some data to work upon, we might say the work done in the last district mentioned in the contract was outside of the limit. The failure to give us the proper information leaves us but one course to pursue: The recovery will be scaled down to the limit the city had power to contract for, and held valid within that limit. The excess is invalid. The judgment appealed from is modified by deducting therefrom the sum of $228.97, and, so modified, is affirmed. No costs will be allowed to either party, except that respondent shall pay the clerk's fees.

HURLEY *v.* INHABITANTS OF CITY OF TRENTON *et al.*

(*Supreme Court of New Jersey, June 25, 1901.*)

[49 Atl. Rep. 518.]

Municipal Indebtedness—Constitutional Limitation.*—It must be taken to be settled in this court that a contract by a municipality to incur an obligation or indebtedness in excess of existing appropriations for the purpose for which the contract is made is illegal.

Right to Repair Streets Does Not Include Repaving.—The right to "repave" is not embraced within the authority in a city charter to "repair" streets.

Repaving Streets—Appropriation.—The act of May 13, 1884 (Laws 1884, p. 341), authorizing cities to repave streets, expressly limits such improvements to such as shall be made "at the general expense." To authorize a municipality to do work under that statute, it must appear that an appropriation existed, raised or authorized to be raised, for the improvement of streets, within the power conferred by the act.

Same—Same—Bonds.—Under the act approved March 2, 1898 (Laws 1898, p. 43), which is relied upon in this case, the proceeds of the bonds which are authorized to be issued to raise a fund from which the cost and expenses of the repaving must be paid must be in hand before the council can "decide to repave out of said fund."

Same—Same—Same—Contract—Illegality.—The contract brought up cannot be sustained under the city charter of Trenton, or any general statute relating to repaving of streets, and is therefore void.

(Syllabus by the Court.)

Certiorari by Michael Hurley to review the action of the city council of the city of Trenton in contracting to repave certain streets. Contract held illegal, and annulled.

Argued February term, 1901, before GUMMERE and FORT, JJ.

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*See Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 721, and extensive *note*.

James J. Cahill and John H. Backes, for prosecutor.
George W. Macpherson and John Rellstab, for defendants.

FORT, J. The prosecutor, a resident and taxpayer of the city of Trenton, seeks by this writ to set aside a certain contract of the city council of the city of Trenton, awarded to the Barber Asphalt Paving Company, to repave Bank and East Hanover streets, in said city. The first reason assigned is that no fund exists out of which to pay the costs and expenses incurred by the contract. The following agreed fact appears in the record: "It is further admitted by the counsel for the defendants that at the time of the making of the contract mentioned in the writ of certiorari in this cause no bonds had been issued to meet the expenses of the improvement contemplated by the contract, and that no money is on hand or available now to meet the expenses incurred or to be incurred in the making of the improvement." The brief of the counsel of the defendants contained this admission: "It is admitted that there is no money on hand or available, and that no bonds have been issued, to meet the expense of such authorized improvement." It is unnecessary to amplify on this branch of the case, because, if there be no authority for this repaving which will permit it to be done before the fund is in hand from, or authorized by, taxation, the contract is void. It must be taken to be settled in this court that a contract to incur an obligation or indebtedness in excess of existing appropriations for the purpose for which the contract is made is illegal. Waterworks Co. v. Read, 50 N. J. Law, 665, 15 Atl. 10; Humphreys v. City of Bayonne, 55 N. J. Law, 241, 26 Atl. 81.

It is likewise conceded that the city charter of Trenton contains no authority to repave a street, either by assessing the cost upon property owners or at the general public expense, unless the provisions thereof which authorize the repairing of said streets will permit the repaving thereof. It is a cardinal rule of construction of municipal charters that the powers conferred are to be strictly construed, and, where doubtful, held not to exist. 1 Dill. Mun. Corp. §§ 89–91; City of Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; Potts v. City of Cape May, 49 Atl. —. The right to "repave" is not embraced within the authority given in a city charter to "repair" streets. The latter must be done at public expense, by moneys raised by taxation, and contemplates only the keeping of existing pavements or roadways in order. Repaving may be assessed upon property owners as original pavings, where authority exists. Jelliff v. Newark, 48 N. J. Law, 101, 2 Atl. 627.

Is there any statute authorizing the action taken by the council in letting the contract brought up? Two statutes are found relating to the repaving of streets; one an act entitled

"An act to authorize cities to make permanent improvements in the roadbeds of streets at the general expense," approved May 13, 1884 (Laws 1884, p. 341). This act, by its title, expressly limits the improvements to be made to such as shall be done "at the general expense." The body of the act declares, "The expense of such work [that authorized by the act] shall be paid * * * out of the moneys raised by tax for the improvement of streets;" and it further provides that the direction for the improvement shall be by ordinance "passed in the same manner that other ordinances of such city requiring the expenditure of money are passed." It is very clear that this statute cannot be relied upon to sustain the contract here under review. It is true that the repaving for which the contract here sought to be set aside was made was provided for by an ordinance of the city council passed September 18th, and approved by the mayor September 20, 1900. The ordinance states that the repaving is to be with "street asphaltum over Belgian block," under the direction of the street commissioner; but no reference is made in it to the statute under which it is claimed to be passed, nor to the fact that the cost is to be "at the general expense." If authority existed for it, this ordinance would be just as effective for a "repaving" where it was intended to assess property owners therefor as where it was not. The ordinance itself, therefore, is no guide as to what rule of payment for the improvement the council intended should be followed. Nor is it necessary for the legality of the ordinance, or the contract under it, that it should so recite; but it is requisite, when the contract made under such an ordinance is attacked for want of power to make it, to show that at the time the contract was made there existed an appropriation, raised or authorized to be raised, for the improvements of streets, within the power conferred by the act of May 13, 1884. The act of 1884 confers no power to raise money, but simply enables the council to use money "raised for the improvement of streets" to pave, repave, macadamize, repair with broken stone, or otherwise permanently improve the roadbed of any street or avenue. The money must be raised in the manner provided by law for raising money by taxation for the improvement of streets in the city of Trenton. The provisions of this act will not change the rule as to exceeding the appropriations as declared in Waterworks Co. v. Read, supra.

The other act—and the only act in fact relied upon by the defendants—is the one approved March 2, 1898, entitled "An act providing for the repavement of paved streets in cities of this state, and for the issuance of bonds in payment therefor" (Laws 1898, p. 43). This act authorizes the issuance of bonds to an amount "not exceeding four dollars for each inhabitant," to run for 30 years, at 4 per centum per annum, to be sold at not less than par. The third section of the act is as follows: "(3) The proceeds of such bonds, including any premium

thereon, shall be sued by the board having charge and control of the streets in such city in the payment of the costs and expenses hereafter incurred by such city in the repavement of any paved street or streets therein, which said last-mentioned board shall hereafter decide to so repave out of said fund." The fourth section is a repealer of all inconsistent legislation. It will be noted that it is "the proceeds of such bonds" which shall be used for the "cost and expenses incurred in repaving of any paved street" which the city council shall "decide to so repave out of said fund." The contention of the prosecutor is—and, we think, rightly—that no contract can be made for repaving under this statute until the fund is secured, or at least authorized, for the purpose under the authority of this statute. Take the case in hand. No authority to issue bonds to pay the cost and expenses of the proposed repaving in this case has been given by the city council. Such authority must be given by ordinance in the manner provided for the issuance of bonds by the city charter. Can it be said that, because the city council has the right to so authorize, it will so do, and that, because it may so do, there exists a fund out of which such costs and expenses may be paid? It would hardly be so contended. Suppose the city council in office is a different one from the one authorizing the repaving, and they refuse to issue the bonds to raise the fund. Can they be compelled so to do? We think that, before the council can contract any debt to be paid under the authority of this statute, it must possess the proceeds of the bonds issued under it as a fund out of which the cost and expenses not only may, but the fund being raised for that specific purpose must, be paid. It is insisted that it is better for the city that the fund be not raised before the cost and expense is incurred. That question is for the legislature; not for the courts.

It would be difficult to distinguish upon principle the provisions of the act of March 2, 1898, now under consideration, from the act of April 21, 1876 (Laws 1876, p. 366), which was construed by this court to be ineffective to confer upon the common council of the city of Beverly power to incur expenses for supplying the city with water until the money authorized by the act to be raised by loan was actually in hand. Hornby v. Beverly, 48 N. J. Law, 110, 2 Atl. 637. We think that, before the council can contract for repaving of streets, the cost and expense of which must be paid out of a fund from the proceeds of the sale of bonds authorized to be issued by the city under the act approved March 2, 1898, the fund must be in hand. This construction of the act is made the more clear by the fact that by its terms in many cities the board that authorizes the issuance of the bond is not the board which would make the contracts or expend the money. By the first section of the act the board having charge and control of the finances of any city is authorized from time to time to issue bonds, etc.,

while by the third section it is provided that "the proceeds of such bonds * * * shall be used by the board having charge and control of the streets in such city in the payment of the cost and expenses * * * in repaving," etc. In Newark and Jersey City it is quite clear that the board of finance or common council, only, would have power to issue the bonds; while in both of said cities the boards of street and water commissioners—they being "the board having charge and control of the streets"—would make the contracts and expend the money. It may be that the city council of Trenton possesses the same authority as the two boards in other cities, but the two duties are just as distinct in their execution when one body exercises both as when separate boards do so, and a rule of construction which is general must apply to all; and we are of opinion that the board having charge and control of streets in a city cannot incur any obligations under this act, by contract or otherwise, until the proceeds of the issue of bonds is in hand that the board may "decide to so repave out of said funds." This conclusion makes it unnecessary to consider the other questions raised in the case. The action of the city council in awarding the contract brought up by the writ is set aside.

CITY OF ST. LOUIS *v.* CONSOLIDATED COAL CO.

(*Supreme Court of Missouri, Division No. 1, Nov. 12, 1900.*)

[59 S. W. Rep. 103.]

Shipping—License Fee—Interstate Commerce.*—Vessels licensed for coasting trade, as provided by Rev. St. U. S. tit. "L," § 4321, and engaged in transporting freight upon the Mississippi river from Illinois to Missouri, and unloading the same into vessels moored at the improved wharf of the city of St. Louis, cannot be compelled to pay the license fee exacted by St. Louis City Ordinance § 232, which does not exact such fee as compensation for the use of the city's wharf, but for the privilege "of towing boats or other water crafts into or out of the harbor of the city, or from one place to another within said harbor," such ordinance being void as an interference with interstate commerce.

Appeal from St. Louis circuit court, James E. Withrow, Judge.

Action by the city of St. Louis against the Consolidated Coal Company. From a judgment for defendant, plaintiff appeals. Affirmed.

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*See City of Buffalo *v.* Reavy, 1 Mun. Corp. Cas. 83, and *note*, p. 88; Henderson Bridge Co. *et al. v.* City of Henderson (taxation of bridge used by railroad engaged in interstate commerce), 1 Mun. Corp. Cas. 699; New Orleans *v.* Lozes, 2 Mun. Corp. Cas. 263, *note*, 273; *In re* Tinsman, 2 Mun. Corp. Cas. 439, *note*, 445; Chrystal *v.* Mayor, etc., City of Macon, 2 Mun. Corp. Cas. 445; Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.*, 3 Mun. Corp. Cas. 677; Adkins *v.* City of Richmond, 3 Mun. Corp. Cas. 514; State *ex rel.* Bump *v.* Omaha & C. B. Ry. & Bridge Co., 5 Mun. Corp. Cas. 352.

City of St. Louis *v.* Consolidated Coal Co

This is a suit to recover the license charges for two steam tugs and a transfer barge operated by defendant in the harbor of St. Louis, which charges were established by an ordinance of the city which provides as follows: "It shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into the harbor of this city, or from one place to another within said harbor, nor shall it be lawful for any boat or barge to engage or continue in the business of transporting railroad cars within the harbor of this city, without a license for such purpose from said city continuing in force." The ordinance then goes on to prescribe the amount of the license fee, grading it according to tonnage or capacity of the vessel, directing how it is to be collected, etc., and continues: "A reduction of forty per cent. from the rates of license established by this section shall be allowed to vessels owned by residents of St. Louis and returned and assessed for taxation within said city during the year commencing on the first day of June immediately preceding the day on which the license takes effect. The license required by this section shall not issue for a shorter period of time than one month, and the amount paid for the same shall be in lieu of all wharfage during the time that said license remains in force: provided said boat or barge does not engage in any other than towing and transfer business." A further provision of the same section made the running of a tug or barge without the required license a misdemeanor punishable by fine. The petition alleges that the defendant, an Illinois corporation, is indebted to the plaintiff city "in the sum of thirty dollars, being the license charge imposed by said section 232 on the steam tug Gartside, owned by said defendant, and employed by it in towing boats into and out of the harbor of St. Louis, and from one place to another in said harbor, for the period of three months from," etc.; and in like terms it alleges that defendant is indebted to plaintiff in the sum of $50 as license charge of the tug Alice Parker, and $120 for the barge Louisa,—aggregating $200 for the three vessels, for which judgment is prayed. This is the second appeal in this case. When it was here on the former appeal the only question that was raised by the defendant's answer was whether or not defendant was entitled to the 40 per cent. reduction which the ordinance conceded to vessels owned by residents of St. Louis, and returned by them for taxation in the city. Defendant tendered with its answer then 60 per cent. of the amount sued for. This court decided then that the defendant was entitled to the reduction, and reversed the judgment of the circuit court, which was contrary to that view, and remanded the cause for a new trial. City of St. Louis v. Coal Co., 113 Mo. 83, 20 S. W. 699. In the opinion delivered at that time we said that the ordinance was not in conflict with any provision of the constitution of this state or that of the United States. But what was then said was in response

to the issues then made by the pleadings. The only suggestion then made by defendant as to the constitutionality of the ordinance was that, if it was to be construed as discriminating against the defendant because it was not a resident of St. Louis, the ordinance was invalid. That decision was rendered December 19, 1892. Very shortly after the rendition of that decision, to wit, January 23, 1893, the supreme court of the United States, in Harman v. City of Chicago, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216, decided that a similar ordinance of the city of Chicago was, on another point presently to be noted, in conflict with the constitution and laws of the United States. In the light of that decision the defendant amended its answer by adding that its tugs and barge were at the time referred to in the petition duly enrolled and licensed in the district for the coasting trade under the provisions of title "L" of the Revised Statutes of the United States (section 4321), and were, under that authority, engaged in transporting freight upon the Mississippi river from the state of Illinois to the state of Missouri. Upon the pleadings so amended the cause came on for trial again in the circuit court, and was submitted for judgment upon an agreed statement of facts, in which, inter alia, it was admitted that the vessels were enrolled for the coasting trade under United States authority as pleaded, and that in pursuance of that license they were "engaged in transporting freight along and upon the Mississippi river, and from the state of Illinois to the state of Missouri, and that said tugs and barge were engaged in carrying principally coal, and incidentally freight, from the state of Illinois into the harbor of the city of St. Louis, and unloading the same into vessels that were moored at and tied to the improved wharf of the city of St. Louis." There were other paragraphs in the agreed statement designed to affect the amount the plaintiffs would be entitled to recover if the ordinance should be held to be not wholly invalid, and there were instructions asked by the plaintiff on the theory that the ordinance was valid; but as the plaintiff's whole case rests on the ordinance, and as we are satisfied that that is entirely invalid under the constitution and laws of the United States, there is no necessity for setting out those other facts or the instructions asked predicated upon them. The trial court gave an instruction to the effect that "the license fees exacted by the ordinance were an interference with and obstruction upon commerce between the states, over which congress has exclusive control, and that the plaintiff cannot recover." Judgment was accordingly rendered for defendant, and plaintiff appeals.

B. Schnurmacher and Chas. C. Allen, for appellant.
Charles W. Thomas, for respondent.

VALLIANT, J. (after stating the facts). The contention on behalf of the city now is that the license fee required by

the ordinance is a charge for the use of the city's wharf, and not a license tax for the privilege of navigating so much of the Mississippi river as is embraced within the city harbor. If that is a correct conclusion as to the fact, then the conclusion drawn by the learned city counselor as to the law of the case is correct. The supreme court of the United States has in several cases decided that a wharfage charge might lawfully be demanded of vessels licensed by the United States, as the vessels in this case were. In Packet Co. v. City of Keokuk, 95 U. S. 80, 24 L. Ed. 377, the court said: "If the charge is clearly a duty, a tax, or burden, which, in its essence, is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage of vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of the sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character." And further, in the same opinion, it is said: "No doubt neither a state nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized." In that connection the court referred to Cannon v. City of New Orleans, 20 Wall. 577, 22 L. Ed. 417, in which it was held that a city ordinance was invalid which prescribed a rate per ton and duration of moorage "for the levee and wharfage dues on all steamboats which should land or moor in any part of the port of New Orleans." Construing that ordinance, the court said: "We are of the opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring." In Packet Co. v. City of St. Louis, 100 U. S. 423, 25 L. Ed. 688, an ordinance which imposed a wharfage fee regulated by the tonnage of the vessel on every boat landing at the wharf in the city was held valid. In City of Vicksburg v. Tobin, 100 U. S. 430, 25 L. Ed. 690, the doctrine of the cases above mentioned was reiterated, and the further point adjudged that the wharfage fee was valid, though imposed on

a boat that did not land immediately against the wharf, but against a wharfboat which was against the wharf; the court holding that to use the wharfboat under those conditions was to use the wharf. In Transportation Co. v. City of Parkersburg, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584, an ordinance of the city which imposed a charge on boats using its wharf was held to be valid, and that the fact that the charge was graduated by the tonnage of the vessel was immaterial. The court distinguishes in that case a duty on tonnage, as referred to in the federal constitution, and a charge for wharfage. "The one is imposed by the government; the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a rent charged by the owner of the property for its temporary use." In Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487, the court sustained the validity of a statute of Illinois under which toll was charged for boats passing through locks and canals constructed in the Illinois river. It was there said of the federal law in question: "It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight and the taking them on board, or for the repair of vessels." Other decisions from the same high source cited by the learned city counselor fully sustain his contention that the city may lawfully impose a reasonable charge on boats landing at its wharf, or landing against a boat that is moored at the wharf, but the cases above quoted from are sufficient to show the condition of the law on that point. All of those cases are referred to and approved in Harman v. City of Chicago, supra, but the court distinguishes them from that case, and they are to be distinguished from this. The Chicago ordinance which passed under judgment in that case was: "Section 1. No person or persons shall keep, use, or let for hire any tug or steam barge or towboat for towing vessels or craft in the Chicago river, its branches, or slips connected therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned." Then followed other sections indicating the amount of the license fee, the manner of its issuance, etc., and denouncing a penalty of a fine against any one violating the ordinance. Now, let us lay the St. Louis ordinance by the side of the Chicago enactment, and see how they differ, if at all, in legal effect: "Sec. 232. It shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into or out of the harbor of this city, or from one place to

another within said harbor, nor shall it be lawful for any boat or barge to engage or continue in the business of transporting railroad cars within the harbor of this city, without a license for such purpose from said city continuing in force," followed by details as to amount and mode of issuance of license and penalties for its violation. Of the Chicago ordinance the court in that case said: "In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of congress. The requirement that every steam tug, barge, or towboat towing vessels or craft for hire in the Chicago river or its branches shall have a license from the city of Chicago is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of congress to regulate commerce, interstate and foreign." It was a part of the agreed statement of facts in that case that the Chicago river had been deepened and improved for navigation by the city at its expense, and the contention was that the license fee was but a reasonable charge for that service. The court said: "The attempt is made to assimilate the present case to those cases [Huse v. Glover and other cases] from the fact that it is conceded that the Chicago river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this proposition is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river." So, in the case at bar, the ordinance of the city of St. Louis does not exact the license fee on the ground of compensation for the use of its wharf, but it is for the privilege "of towing boats or other water craft into or out of the harbor, or from one place to another within said harbor." It is true there is a qualified provision in the ordinance that the amount paid for the license "shall be in lieu of all wharfage during the time said license remains in force," but that clause only more clearly distinguishes the license fee from a wharfage toll, and it simply means that the city will

not exact wharfage from the owner of a vessel who has paid the city license for the privilege of navigating that part of the river embraced within the city harbor. But even that exemption does not apply to all vessels carrying the city license, but only to those that do "not engage in any other than towing or transfer business." The case is before us now upon totally different questions from those presented in the former appeal, and doubtless the decision in Harman v. City of Chicago, which, as we have seen, followed very shortly after our decision on the former appeal, suggested the changes. The defendant, in the light of that decision, discovered that its rights, under the federal constitution, as a navigator in the coasting trade, were being violated; and the plaintiff, to avoid the force of that charge, was compelled to take the position that these license fees were in fact compensation for wharfage. But that idea was not in this case from the beginning, and is not even now found in the plaintiff's petition. The statement in the petition is that the defendant is indebted to the plaintiff for a license fee imposed on the tugs owned by defendant and "employed by it in towing boats into and out of the harbor of St. Louis, and from one place to another within said harbor," and in that respect the petition closely follows the ordinance on which it is founded. The constitution of the United States ordains that "congress shall have power * * * to regulate commerce with foreign nations and among the several states" (article 1, § 8); and "no state shall, without the consent of congress, lay any duty of tonnage" (article 1, § 10). We are of the opinion that the ordinance of the city of St. Louis on which this suit is founded is in violation of those provisions of the federal constitution, and therefore invalid. This is the view taken by the learned trial judge, and the judgment of the circuit court is affirmed. All concur, except MARSHALL, J., not sitting, having been of counsel.

STATE *et al. v.* CALDWELL.

(*Supreme Court of North Carolina, Nov. 7, 1900.*)

[37 S. E. Rep. 138.]

License Tax—Interstate Commerce*—Delivery of Goods by Agent.—An agent of a portrait company who receives pictures and frames in an unfinished state shipped by his firm in another state to itself, breaks the bulk, and places the pictures in their proper frames, and delivers them to persons who previously contracted for them with other employees, is within a city ordinance declaring that persons engaged in the business of selling or delivering picture frames or pictures in such city, whether an order shall have been previously taken or not, shall pay a certain license tax.

Same—Same—Same—Breaking Original Package.—A city ordinance declaring that persons engaged in selling or delivering picture frames

*See cross reference *note* to City of St. Louis *v.* Consolidated Coal Co., *ante*, p 276.

State *v.* Caldwell

or pictures in such city, whether an order for the same shall have been previously taken or not, shall pay a certain license tax, is not in violation of Const. U. S. art. 1, § 8, as a regulation of interstate commerce, as applied to an agent who received pictures and frames shipped by his firm in another state to itself, in "knockdown" shape, broke the bulk, put the pictures in their proper frames, and delivered them to customers previously obtained by other employees of the firm.

FAIRCLOTH, C. J., and CLARK, J., dissenting.

Appeal from superior court, Guilford county; Moore, Judge.

E. M. Caldwell was convicted of a violation of an ordinance of the city of Greensboro, and he appeals. Affirmed.

Chas. M. Stedman, for appellant.

The Attorney General and Scales & Scales, for appellee.

FURCHES, J. This is a prosecution for an alleged violation of an ordinance of the city of Greensboro. There was no objection or exception to the manner in which it was commenced, and it may be maintained if the defendant has violated the city ordinance (State v. Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446), unless the ordinance is in contravention of the doctrine of interstate commerce, and therefore is unconstitutional. The case comes to this court on appeal of defendant from the judgment of the court below upon the following special verdict: "That on the —— day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro. That the defendant went to the Southern Railway freight station, and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames, and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro. The defendant had been engaged in this work two days when arrested. That section 57 of the charter of the city of Greensboro, N. C., is as follows: 'That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely: * * * (21) Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board of aldermen shall have power to impose a

license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year.' The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section. That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken: 'Be it ordained by the board of aldermen of the city of Greensboro, North Carolina: That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year. Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense.' That neither the defendant, the Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company, have paid the city any license tax. If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise, they say that he is not guilty." Upon this special verdict the court held that the defendant was guilty, and the verdict was so entered, and the defendant fined $20. From this verdict and judgment the defendant excepted, and appealed to the supreme court.

The defendant assigns as ground of error: "(1) The facts set out in the special verdict do not make the defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do, within the purview and contemplation of the ordinance of the city of Greensboro. (2) That, should defendant be held liable under the ordinance in controversy, said ordinance is unconstitutional, being in conflict with section 8 of article 1 of the constitution of the United States, being an interference with, and an attempt to regulate, commerce among the states, and a burden upon the same." We will consider these assignments in the order in which they are stated; for, if the defendant has not been guilty of carrying on a business in violation of the city ordinance, then he is guilty of no offense,—is not guilty,—and there is nothing for the second assignment to rest upon.

It seems to us that a good way to test this exception is to devest our minds of the fact that the defendant was the agent of the Chicago Portrait Company, and to consider him as a citizen of Greensboro, who had bought these pictures, and had them shipped to him in the unfinished state they were. And if he had taken them to his house, opened them, assorted them, and put them together, and then sold and delivered

them to parties in town, would he not have been a dealer engaged in selling and delivering pictures and picture frames in violation of the ordinance? We think he would, and would be guilty,—would be unless he is protected by reason of the unconstitutionality of the ordinance, as stated in the second assignment of error. And, it being claimed in this assignment that it involves a constitutional question,—that it is in violation of "section 8 of article 1 of the constitution of the United States, being an interference with, and an attempt to regulate, commerce among the states, and a burden upon the same,"—it becomes an important question, and should be well considered. This has been well done, by arguments of the learned counsel, and the well-considered brief of defendant. It is contended in this brief that no state has a right to levy a tax on interstate commerce, and for this Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, and Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, are cited. This position is true. And the defendant then contends that this ordinance is unconstitutional because it levies a tax on interstate commerce. For this position he cites quite a number of cases which he says sustain it. Among them, we will only mention those apparently most relied on. Robbins v. Taxing Dist., 120 U. S. 480, 7 Sup. Ct. 592, 30 L. Ed. 694; Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Adkins v. City of Richmond (Va.) 34 S. E. 967, 47 L. R. A. 583. The proposition of law contended for is undisputedly true,—that a state cannot tax interstate commerce. The trouble is, not in not being able to understand this rule of law, but in applying it. The defendant insists that Brennan v. City of Titusville, supra, is directly in point,—is in every essential fact this case,—and should control the opinion of the court on this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case the goods were shipped directly to the purchaser. In this case they were shipped by the Chicago Company to itself, in the city of Greensboro; and when they reached Greensboro the defendant, as the agent of the Chicago Company, received them from the railroad at its depot, carried them to its rooms in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of Brennan v. City of Titusville, supra; and we should hold, as it was held there, that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The

contract to make and deliver these pictures was an executory contract, and no title passed by this contract. Tied. Sales, §§ 88, 89; Drill Co. v. Allison, 94 N. C. 548. If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago; the railroad being deemed to be the agent of the consignee. State v. Groves, 121 N. C. 632, 28 S. E. 403; Railroad Co. v. Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611, and Brennan v. City of Titusville, supra, would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago, and shipping them to the parties who had contracted for them, they were shipped to itself (the Chicago Portrait Company), in Greensboro. This being so, no title ever passed from the Chicago Portrait Company until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago Company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them, in Greensboro, without becoming liable for a city tax, for which its own citizens would be liable? It seems to us that it could not. This case seems to fall under the doctrine of Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, and Range Co. v. Carver, 118 N. C. 328, 24 S. E. 352. There was no sale—no title passed from the Chicago Portrait Company—until the pictures were completed and delivered to the purchasers. We are, therefore, of the opinion that the defendant was engaged in the business of selling and delivering pictures and picture frames in the city of Greensboro; and, as we are not able to see how the enforcement of this ordinance interferes with interstate commerce, the judgment of the court below is affirmed.

CLARK, J. (dissenting). The orders for the portraits and frames were taken in Greensboro by the traveling agent of a Chicago firm. If the portraits made in Chicago in consequence of such contract had each been sent direct to the person for whom it was made, this would have been interstate commerce. This feature of the transaction is not changed by the fact that a batch of portraits was sent "knocked down" to Greensboro, the frames and portraits packed separately, and were by another agent of the shipper, who came to Greensboro for that purpose from Chicago, put together, each portrait in its frame. This was simply an economical method of transportation. There is no new contract with the customer. There was no "breaking of bulk." in the legal meaning of the term; for each article, though shipped with others, kept its individuality. Each portrait could be of use only to the person for whom it had been made, and was as distinctly severed from the rest by that fact as if it had been sent in a separate

cover. The only contract was that between the Chicago firm's agent, in the first instance, and the customer. The title does not pass until the picture is approved and paid for. This is the same case as Robbins v. Taxing Dist., 120 U. S. 480, 7 Sup. Ct. 592, 30 L. Ed. 694, in which it was held that the business of offering for sale or selling goods to be shipped to the buyer from another state is interstate commerce. This is not the case of State v. French, 109 N. C. 722, 14 S. E. 383, or State v. Wessell, 109 N. C. 735, 14 S. E. 391, in which the goods were bought in another state, shipped here in bulk, and then by the buyer were sold to his customers. The sale by such buyer to his customers was a North Carolina business, and taxable. But here the only "dealing" is between the Chicago house, through its agent, with a customer here, and the shipping of the identical article to an agent in Greensboro, whose sole duty is to complete the delivery upon the payment of the purchase money.

FAIRCLOTH, C. J. I concur in the dissenting opinion.

STATE *v.* WILLINGHAM.

(*Supreme Court of Wyoming, Nov. 15, 1900.*)

[62 Pac. Rep. 797.]

Ordinance—Constitutional Law—Interstate Commerce.*—A city ordinance which provided a fine for any person keeping a store or selling goods without a license, but which excepted from its operation merchants or other persons selling goods who paid an annual tax on such goods under the revenue laws of such city, also traveling agents selling exclusively by sample or otherwise to regular merchants doing business in the city, is void, as in restraint of interstate commerce.

Same—Same—Unequal Taxation.—A city ordinance providing for a license on persons selling goods within the city, but excepting from its operation persons selling goods on which an annual tax has been paid according to the revenue laws of the city, and also traveling agents selling exclusively by sample or otherwise to regular merchants doing business within the city, is not void as in conflict with Const. art. 1, § 28, providing that all taxation shall be equal and uniform.

Constitutional Law—Interstate Commerce—Delivery by Agent—Conflict of Laws.—Where a traveling agent solicited orders for portraits and picture frames, and sent such orders to the home office of the concern, in another state, from which the articles ordered were subsequently shipped, consigned to the company, and then delivered by the agent to the customers, and the prices agreed on at the time the order was given collected, the contract is one of the state wherein the home office is located, and the goods remain subject to interstate commerce regulations, the delivery by the agent to the persons ordering them not constituting a sale by him within the state.

Reserved questions from district court, Laramie county; Richard H. Scott, Judge.

Almoth O. Willingham was convicted of a violation of an ordinance of the city of Cheyenne providing for the licensing

*See cross reference *note* to City of St. Louis *v.* Consolidated Coal Co., *ante*, p. 276.

of transient merchants and vendors, and appealed to the district court, which reserved questions for the supreme court.

The defendant was convicted before a justice of the peace of a violation of an ordinance of the city of Cheyenne entitled "An ordinance concerning city licenses," and sentenced to pay a fine of $50 and costs. The ordinance is as follows:

"Section 1. That any person or persons, company or corporation, who shall directly or indirectly, keep a store, or sell, vend or retail any goods, wares or merchandise, without being first duly authorized by a license as hereinafter provided, the person or persons, company or corporation, so offending shall be fined in any sum not less than fifty dollars nor more than one hundred dollars: provided, this ordinance shall not be construed to apply to the sale of goods, wares or merchandise by merchants or other persons who pay an annual tax upon such goods, wares or merchandise, assessed according to the revenue laws of this city: provided, further, that this ordinance shall not apply to traveling agents who sell exclusively by sample or otherwise to regular merchants doing business in this city.

"Sec. 2. That from and after the passage and approval of this ordinance any person or persons, company or corporations, not paying an annual tax as hereinbefore provided, shall pay a license of twenty-five dollars per month: provided, that no license shall be issued for less time than one month."

It appears that the defendant, as agent of the Chicago Portrait Company, a concern engaged in the business of making portraits and picture frames in Chicago, solicited orders in Cheyenne, and the portraits and frames ordered were subsequently shipped from Chicago to Cheyenne, being consigned to the Chicago Portrait Company. The defendant was engaged in delivering them to his customers, and collecting the prices agreed upon at the time the orders were given, when he was arrested. The company had no place of business in the state of Wyoming, and was doing business in this state only as was being done by Willingham at the time of his arrest. The persons to whom said portraits and frames were delivered were not regular merchants doing business in the city of Cheyenne paying taxes to the city, and the defendant had no license. He appealed to the district court, which has reserved certain questions for the decision of this court. The questions are very long, and the substance of them is sufficiently stated in the opinion of the court.

E. W. Mann, for the State.
W. R. Stoll, for defendant.

CORN, J. (after stating the facts). There are two principal questions presented in this case: First, whether the ordinance is void because in violation of the interstate commerce clause of the constitution of the United States; and, second, whether it is void as in violation of the provision of section

28, art. 1, of our state constitution that "all taxation shall be equal and uniform."

The principles which control the decision of the first question, with the authorities, were set out in a very clear and well-considered opinion by Chief Justice Groesbeck in the case of Clements v. Town of Casper, 4 Wyo. 495, 35 Pac. 472. We do not deem it necessary to rehearse the reasoning of the court in that case. But since that decision was rendered the supreme court of the United States have again passed upon the question in a case where the facts were almost identical with those in the one before us. Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. In that case a maker of portraits and picture frames in Chicago had sent his agent into the state of Pennsylvania to solicit orders for pictures and picture frames by going personally to citizens and residents of that state. Upon receiving orders for pictures and frames, the agent forwarded such orders to the manufacturer in Chicago, where the goods were made and shipped by him to the purchaser in Titusville, by railroad freight or express, the express companies or the manufacturer's agents collecting the price of the goods, and forwarding the amounts to him at Chicago. The ordinance of the city of Titusville required that persons so employed in canvassing or soliciting in the city should procure a license from the mayor, paying therefor certain sums fixed by the ordinance, but providing that its provisions should not apply to persons selling by samples to manufacturers or licensed merchants or dealers residing and doing business in said city. After examining the authorities, the court decided that it must be held that the license tax imposed upon the defendant was a direct burden upon interstate commerce, and was therefore beyond the power of the state. Those decisions are controlling in this case, and the ordinance in question must be held to be void, as in conflict with the interstate commence clause of the constitution.

The second proposition, that the ordinance is void because in conflict with the provision of the constitution of this state requiring that "all taxation shall be equal and uniform," stands upon entirely different ground. The sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, it may select any particular species of property, and tax that only, if, in the opinion of the legislature, that course will be wiser. And what is true of property is true of privileges and occupations also. The state may tax all, or it may select for taxation certain classes, and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution. Cooley, Tax'n, 570. In a number of the states it has been held that the constitutional requirement of equality and uniformity does

not apply at all to the taxation of occupations, owing to the fact that the taxation of all occupations equally would work the greatest possible injustice, and is impossible in practice. But, if applicable at all, it does not deprive the legislature of the power of dividing the objects of taxation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class. State v. Lathrop, 10 La. Ann. 402. To be uniform, taxation need not be universal. Certain objects may be made its subject, and others may be exempted from its operation; certain occupations may be taxed, and others not; so some occupations may be taxed for a greater amount, and others for a less; but, as between the subjects of taxation in the same class, there must be an equality. State v. Poydras' Widow and Heirs, 9 La. Ann. 168. As said in a Virginia case: "The requisitions of the constitution may be carried out by a uniform tax on licenses to persons following the same pursuit, under the same conditions and circumstances. A difference therein will justify a discrimination in the tax." Slaughter v. Com., 13 Gratt. 776; Ex parte Mirande, 73 Cal. 373, 14 Pac. 888; Cooley, Tax'n (2d Ed.) 169.

Tested by these rules, we are unable to perceive that the ordinance conflicts with the clause of the constitution in question. There is nothing unequal in classifying differently merchants who pay an annual tax upon their stocks of goods under the revenue laws of the city and those who pay no such tax. But, upon the contrary, it seems to be an attempt to secure entire equality as nearly as may be by requiring each class to contribute its proportion to the fund necessary to defray the expenses of the city government. Nor is there anything unreasonable or unequal in exempting from this tax the traveling salesmen, who supply the regular merchants, in whole or in part, with their stocks of goods upon which they pay taxes to the city. The distinctions between the two classes are apparent. The latter are, in a sense, the assistants and purveyors of the regular merchants, the goods sold by them pass at once into the stocks of the merchants to be assessed for taxation, and any license fee required of them would operate in a measure as a double tax upon the merchants who buy from them; while the goods sold by the other class become at once the personal belongings of their customers, and inevitably, in a great measure, escape taxation.

The foregoing is a sufficient answer to all of the voluminous questions presented for the consideration of the court, except the ninth and tenth, which may require a separate consideration. The substance of them is, did the goods, under the cirumstances, become a part of the general mass of property of this state upon their shipment to Cheyenne, and not the subject of interstate commerce, and did the delivery of them by the agent constitute a sale? The general rule is that, in the absence of special authority to bind his principal, the

drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal. Up to that time the order is a mere proposal, and the place of the contract is where the proposal is accepted. Gill v. Kaufman, 16 Kan. 571; Burbank v. McDuffee, 65 Me. 135; McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485. From the statement of facts in this case, it appears that the portraits and frames were manufactured in compliance with the order, and shipped to Cheyenne for the purpose of being delivered to the persons ordering. This was an acceptance of the order, and it was an Illinois contract. The delivery of the articles to the persons ordering did not constitute a sale by the agent making the delivery, but the manufacture, shipment, and delivery of the goods were simply steps taken by the Chicago Company in the performance of its contract. The shipment of them by the company to itself at Cheyenne had no greater significance than if they had been sent by the company from one of its warehouses to another in the city of Chicago. They were still the subject of interstate commerce, and the arrest of the agent was not authorized by law.

POTTER, C. J., and KNIGHT, J., concur.

CITY OF FERGUS FALLS *v.* FERGUS FALLS HOTEL CO.

(*Supreme Court of Minnesota, June 11, 1900.*)

[83 N. W. Rep. 54.]

The officials of a municipal corporation, in violation of law, loaned its money to a private person, taking as security a mortgage upon certain property. *Held*:

Ultra Vires Contract*—Unauthorized Loan—Collection of.—That the city may evoke the powers of the courts to enforce collection of the debt by foreclosure proceedings.

Same—Same—Rights of Purchasers Having Notice of City's Lien.—Purchasers of the property subsequent to the execution of the mortgage, but with notice of the mortgage lien, cannot take advantage of the fact that the act of the city officials was *ultra vires*.

Rulings of Court.—Certain rulings of the court examined, and found to contain no error.

Evidence, Sufficiency of.—Evidence examined, and found to justify the conclusion that the city's money was loaned as stated.

BROWN, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Ottertail county; William A. Cant, Judge.

Action by the city of Fergus Falls against the Fergus Falls Hotel Company. Verdict for plaintiff. From an order refusing a new trial, defendant appeals. Affirmed.

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*See Mayor of Nashville *v.* Sutherland, 19 L. R. A. 619, and *note*; Huron Waterworks Company *v.* City of Huron (brief), 30 L. R. A. 650; *note*, 5 Mun. Corp. Cas. 739–741.

City of Fergus Falls *v.* Fergus Falls Hotel Co

John W. Mason and Chas. C. Houpt, for appellant.

Wm. L. Parsons, Jas. A. Brown, and C. L. Hilton, for respondent.

LEWIS, J. Action by respondent city to foreclose a mortgage upon certain hotel property in the city of Fergus Falls. Defense, that the city cannot maintain an action to enforce securities taken on a loan, the same being void, against public policy, and ultra vires. The action was tried by the court without a jury, and resulted in an order for judgment in favor of respondent. Defendant appeals from an order denying its motion for a new trial.

The trial court found that in 1890 one Bell and wife executed and delivered to the First National Bank of Fergus Falls their promissory note for $10,000, due five years from date, with interest at 2 per cent., and at the same time, to secure the note, executed and delivered a mortgage upon certain premises in Fergus Falls known as the "Grand Hotel Property." This mortgage was duly recorded, and contained the usual covenants for foreclosure upon default of payment. The amount of the consideration of the mortgage —$10,000—was paid to Bell by certain officers of the city of Fergus Falls out of the city funds as a loan to him from the city. The bank had no interest in the mortgage, but simply held it in trust for the city, and afterwards, in 1896, executed and delivered to the city a declaration of trust to that effect. In 1898 the bank duly assigned the mortgage to the city, which assignment was duly recorded. After executing the mortgage, in 1891, Bell and wife deeded the property to one George Duryee, and finally the premises were conveyed to defendant in 1892. On the question of notice of the mortgage by defendant when it purchased the property the court found as follows: "That said defendant, the Fergus Falls Hotel Company, at the time of the making and delivery of said last-described deed, and at all times thereafter, has actual notice and knowledge of the existence of said mortgage, and at all times prior to the beginning of this action, in all its dealings with plaintiff in reference thereto, said defendant recognized and admitted said mortgage as a valid and subsisting lien upon the property described; that said mortgage was fully considered and taken into account by said defendant in its negotiations for the purchase of said premises and in arriving at the purchase price to be paid therefor." The court further found that the property was sold for the 1893, 1894, and 1895 taxes, and that respondent was forced to pay $1,847 to protect the property from loss under tax judgments; that the taxes of 1897 were not paid, and the property sold for the same in May, 1899. It is further found that on the 30th day of April, 1895, the principal was extended for the period of five years, at request of appellant. The interest was paid by appellant up to the 23d day of September, 1896. As conclusions of law: That defendant was indebted to the plaintiff in the full amount of

the principal, interest, and taxes paid, and that the property be sold to satisfy the same.

1. Section 31, c. 5, of the Special Laws of 1883 provides: "No money shall be paid out of the city treasury, except for principal or interest on bonds, unless such payments shall be authorized by a vote of the city council, and shall then be drawn out only upon orders signed by the mayor and countersigned by the city clerk, which orders shall specify the purpose for which they are drawn out, and the fund out of which they are payable and the name of the person in whose favor they may be drawn, and may be made payable to the order of such person." The order upon which the city treasurer paid out the money (Exhibit 5) is as follows: "Fergus Falls, Minn., Sept. 23, 1890. Please pay to C. D. Wright ten thousand dollars out of the permanent fund belonging to the city of Fergus Falls. E. Shaver, Acting Mayor. Wm. Hoefling, Clerk pro tem. To F. J. Evans, City Treasurer, $10,000." Defendant objected to the introduction of this order in evidence upon the ground that it was void on its face, not showing the purpose for which the order was drawn. The objection was overruled, and the order received. This ruling is assigned as error. Counsel for the appellant take the position that the order was void for the reason assigned, that it would afford the city treasurer no protection if he paid out the city's money on such an order, and for that reason the city cannot predicate any rights upon it. Admitting that the officials of the city council issued a void order, and would be liable for so doing, and that the city treasurer paid out the money without authority, and that the order would not protect him, this only goes to show that the money was obtained from the city by an indirect and illegal manner, through the acts of its officers. The main issue to be determined in this case was whether the city had loaned the money, and could call into action the powers of the courts to enforce the collection of the debt. It is immaterial whether the money was obtained upon an order void upon its face or regular upon its face. Neither is it material whether the officers were acting in good faith, as, no doubt, they were. The only purpose of introducing the order was to show that the money was paid out of the city treasury, and it was properly received.

2. Appellant claims that there was no evidence to justify the finding that the city ever loaned the money to Bell, conceding that he received the benefit of it. The argument is based upon two propositions: (1) That, the order being void, the city treasurer had no right to pay it, and charge the amount to the city. The act being void, no money of the city passed. (2) That the money coming to the treasurer was deposited in the banks in open account, subject to the treasurer's check; that the city had no money on deposit, but had parted with its title to the banks, upon the theory that the bank acquired title to the money deposited on open account.

This may be technically true as a result of the method of bookkeeping; nevertheless, by means of the order, and a check drawn on the city funds in the bank, $10,000 of the city's money was drawn out, and paid over to the use of Bell. This was the ultimate fact found by the court, and the evidence is conclusive.

3. Again, it is urged that the city, having no power to make the loan, cannot evoke the powers of the courts in collecting it. The city certainly had no authority to loan this money. The act was not within its charter powers; but it does not follow that the city cannot recover it. It is true that the doctrine of ultra vires is, and ought to be, rigidly enforced in favor of a municipal corporation in order to protect its taxpayers from being plundered by the unlawful acts of its officers. But when, as in this case, a municipal corporation is seeking to have restored to its treasury money taken therefrom under color of an ultra vires contract, it does not lie in the mouth of the beneficiary of the wrongful act, or of his assignee with notice, to say that a lien securing the payment or return of the money is void because the money was obtained by virtue of a void contract; otherwise, the wrongdoer would be permitted to take advantage of his own wrong to the injury of innocent taxpayers. There can be no question about the city's power to collect from Bell if he were alive and solvent, under the decision in City of Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737, and there is no distinction in principle between that case and this. That decision rests upon the theory that the contract on the part of the city by which it paid $500 for the establishment of a shoe factory was void, being beyond its powers. The corporation, as such, had no power to make it, and its officers had no power to bind it. The money having been paid without authority, its payment was not a corporate act, and the corporation could recover the money. The principle applied in that case is not changed by the effect of Cr. Code, §§ 136, 369, 370. Those sections apply to public officers, but can have no application to the city as such. The general rule that the law leaves the parties to an illegal transaction where it finds them has no application. The officers of the city are not the city. The city cannot be bound by the unlawful acts of its officers in paying out its money. And, if the city may recover the money from those who received it, why may it not foreclose the mortgage, it being impossible to secure the money, or any part of it, in any other way? There is no difference in principle between the two remedies. The city is only recovering what it can of the funds illegally taken from its treasury. The defendant cannot complain. It bought the property with notice of the city's claim and lien. It is in no worse position than if the loan had been made by a private party. And it would be inequitable to permit it to benefit by the illegal act of the city officials under such circumstances. This right of

a municipal corporation to enforce its claims under such circumstances has been recognized or applied in the following cases: Deering v. Peterson, 75 Minn. 118, 77 N. W. 568; Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; City of Buffalo v. Balcom, 134 N. Y. 532, 32 N. E. 7; Hay v. Railroad Co. (C. C.) 20 Fed. 15. Order affirmed.

LOVELY, J., absent, took no part.

BROWN, J. I dissent. My reason for doing so is not that I do not share the sympathy of my Brethern for the city of Fergus Falls and its taxpayers, but because the conclusion reached by them is not in harmony with the law as we find it in the books, and is subversive of the best interests of taxpayers and municipalities generally. The decision will tend to encourage public officials inclined in that direction in the notion that public funds may be lawfully invested in private enterprises, and establish a rule that, although a crime to so divert such funds, the legality of the transaction can be called in question in a civil action only when the interests of the municipality demand that it be impeached. The public interests would be best subserved by a square, blunt decision that public funds cannot be so used, and that contracts of this kind are a nullity, and cannot be enforced. There is no controversy or dispute as to the facts. The complaint alleges, and the court below found, that the city of Fergus Falls loaned to one Dawson Bell the sum of $10,000, to be repaid in five years, with interest at the rate of 2 per cent. per annum. At the time of the loan Bell owned the real property described in the complaint, and executed to C. D. Wright, in trust for the city, a mortgage thereon as security for such repayment. Wright subsequently assigned the mortgage to the city, and it now seeks to foreclose it. Bell is dead. Defendant hotel company has succeeded to his title to the property, but did not, in the purchase thereof, assume or agree to pay the mortgage debt. It does not appear that the money so loaned Bell was used in the purchase or improvement of the mortgaged property. From aught that appears, the loan was an ordinary business transaction, and the city offers no suggestion that its officers exceeded their authority, but, on the contrary, affirms, adopts, and approves their conduct. The real question in the case is whether municipal corporations of this state can engage in the loaning business, and as this question is answered so should the case be decided. It is generally understood that such corporations are limited and restricted in their contracts and dealings to matters essential to the good order and government of the municipality and the comfort and welfare of the inhabitants. Contracts with individuals in the interests of private affairs are beyond their authority, and void. This rule is one universally recognized and applied. That the contract involved in this case was one with an individual, and in the interests of private affairs, is not disputed. That the loan of public funds to further and promote private objects

and interests is against the best interests of the municipality whose funds are so loaned, and against public policy, cannot for a moment be doubted. That such a transaction is not only beyond the legitimate authority and power of the municipality, and, in this state, a palpable violation of positive law, cannot be denied. Yet this court solemnly declares the same a valid and enforceable contract and transaction.

The rigor of the old rule of ultra vires has been much relaxed of late years, especially as to private corporations, and the doctrine of estoppel is now often applied to the end that justice may be done. As to contracts merely ultra vires,—that is, contracts not within the express or implied delegated authority of the corporation,—the doctrine of estoppel is applied to prevent a party who has received the benefit of a part performance from setting up want of authority in the corporation as a defense to a performance on his part. And perhaps this doctrine has been applied in some cases for a like purpose where the contract is not only ultra vires, but illegal, because prohibited by law. But the great preponderance of the authorities hold the illegal contract wholly void, and incapable of ratification. 1 Beach, Pub. Corp. 217, 218, 248; City of Ottowa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; Smith v. City of Newburgh, 77 N. Y. 130; McDonald v. Mayor, etc., of New York, 68 N. Y. 23; Lewis v. City of Shreveport, 108 U. S. 282, 2 Sup. Ct. 634, 27 L. Ed. 728; Board of Sup'rs v. Arrighi, 54 Miss. 668; Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 10 Sawy. 464, 22 Fed. 245; Id., 10 Sawy. 479, 23 Fed. 232. Such contracts are on a par with illegal contracts between individuals, and possess no greater virtue because made by a corporation. And the rule is, as I understand it, that, whether partly performed or not, they are utterly void, and cannot be enforced. See authorities supra, and 1 Beach, Pub. Corp. 217 et seq.; Sutro v. Pettit, 74 Cal. 332, 16 Pac. 7. Says Blackburn, J., in L. R. 9 Exch. 244: "I do not entertain any doubt that if, on the true construction of any statute creating a corporation, it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void." The right of the city of Fergus Falls to collect and expend public money is limited by the act of the legislature creating it to public purposes, and a diversion of such funds to a private purpose is not only beyond its delegated authority, but palpably against public policy, and should for this reason, if for no other, be held void. But such a diversion of public funds is expressly made a felony by section 369 of our Penal Code, and this renders the transaction wholly illegal, irrespective of other considerations. But my Brethern say that the city is not responsible for the unlawful acts of its officers. This may be, and doubt-

less is, true, as a general proposition of law, but cannot be true when applied to a city attempting to enforce a contract which is the result and grows out of such unlawful conduct. If a municipality departs from its true character, and enters into competition with money loaners, it must submit to the law applicable to the business thus engaged in. It is elementary that a principal cannot adopt or ratify a contract made by his agent in violation of his authority in part and reject it in part. If the principal ratify such a contract, he must take it clothed with such virtues and benefits as it is possessed of, and burdened with such inequities and illegal features as the transaction giving it existence surrounds it. 1 Am. & Eng. Enc. Law, 1192, and cases cited. A municipal corporation cannot enter the field of commercial enterprises without subjecting itself to all commercial laws and usages. In Newbery v. Fox, 37 Minn. 141, 33 N. W. 333, this court said: "The doctrine of ultra vires has with good reason been applied with greater strictness to municipal bodies than to private corporations. * * * A different rule would, in effect, vastly endanger the powers of public agents to bind a municipality by contracts not only unauthorized, but prohibited, by law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent." Judge Dillon says: "The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." But the law of ultra vires, as applied to contracts merely in excess of corporate power, is not the law by which this case should be judged. We have the additional element of illegality, and the law with respect to illegal contracts should control. Comyn, in his work on Contracts, lays down the law as follows: "And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but when the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that plaintiff should recover." This is the law to-day, and is supported by the great weight of authority. It applies to this case, because the transaction here in question is not only illegal as against public policy, but illegal because a violation of law. See State of Wisconsin v. Torinus, 24 Minn. 332; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299. In Borough of Henderson v. Sibley Co., 28 Minn. 515, 11 N. W. 91, and City of Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737, the

unlawful contract and the illegal acts of the public officers were repudiated, and the action was to recover back the money unlawfully taken from the treasury. This same remedy should have been resorted to by the plaintiff, instead of attempting to ratify and confirm the illegal conduct of its officers. My Brethern make no attempt to distinguish this case from State v. Torinus, supra, which is directly in the teeth of their decision. Neither do they explain why there should be a departure from Bisbee v. McAllen, surpa. In that case there was a sale of groceries and provisions, and the defendant pleaded as a defense to an action to recover the purchase price thereof that plaintiff's weights and measures by which the goods were sold had not been sealed and tested as required by the statute of the state. The court held the transaction illegal, and that plaintiff could not recover. There was no attempt to apply the doctrine of estoppel in that case, though equity and good conscience would seem to have justified its application, if it can be justified in this case. The transaction involved in this case was void ab initio because of its illegality, and I submit that life could not be infused into it by even a most vigorous application of the doctrine of estoppel. 1 Am. & Eng. Enc. Law, 1182 et seq. The case of City Council of Montgomery v. Montgomery & W. Plank-Road Co., 31 Ala. 76, is directly in point. It is there said: "It is further urged in maintenance of this action that, inasmuch as the plank-road company has had the benefit of the city bonds, and obtained them on the faith of the contract which is the subject of this suit, the obligors on this bond should be held estopped from disputing the authority of the city to make the contract. If this doctrine be adopted, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers upon them which the legislatures have withheld. A proposition so erroneous can scarcely need argument to overturn it. See, on this point, Navigation Co. v. Dandridge, 8 Gill & J. 248, 249, 320, and authorities cited; Albert v. Bank, 1 Md. Ch. 407, 413; Smith v. Trust Co., 4 Ala. 558; Hodges v. City of Buffalo, 2 Denio, 110; Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31; Insurance Co. v. Ely, 5 Conn. 560. It will be remembered that in this case it is the corporation itself which sues. The suit is an attempt to enforce the contract which a corporation had no authority to make, save as above indicated. We cannot apply the doctrine of estoppel to such a case as this."

Defendant is not estopped from denying the validity of the mortgage merely because it succeeded to Bell's title to the property. Calkins v. Copley, 29 Minn. 471, 13 N. W. 904; Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91. Farmer v. City of St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A.

199, is not in point. It appeared in that case that the city of St. Paul was liable for the care and support of persons committed to prison by the municipal court of that city. Such prisoners were committed to the House of Good Shepherd, which was not a public prison or workhouse, and the court held the contract between the city and the persons in charge of such House of Good Shepherd for the support of such prisoners to be unauthorized, but very properly held that it was only "technically illegal"; this result no doubt being founded on the fact of the liability of the city to pay the expense of such persons at some proper place of confinement, and no illegal obligation was in any way created. Neither is the case of Deering v. Peterson, 75 Minn. 118, 77 N. W. 568, in point. In that case it appears that the legislature had authorized the loan of seed grain to farmers who had lost their crops by hail, and the contract involved was made and entered into in accordance with the requirements and commands of the statutes, and not, as in this case, in violation thereof. This court, subsequent to the date of the contract, declared the seed-grain law unconstitutional, thereby rendering the contract, as said in Farmer v. City of St. Paul, supra, "technically illegal."

For these reasons I think the order appealed from should be reversed, and a new trial granted. If this decision be followed in the future, cities, towns, and villages of this state may understand that it is lawful to appropriate funds from the public treasury for investment in boot and shoe factories, brick yards, and hotels and lunch counters.

STATE *v.* CITY OF PULLMAN.

(*Supreme Court of Washington, Dec. 18, 1900.*)

[63 Pac. Rep. 265.]

Municipal Contract—Extension of Water System—Ultra Vires Agreement.*—1 Hill's Code, § 683, provides that, when the erection of any public works or improvements requires an expenditure of more than $100, it shall be done by contract, and let to the lowest responsible bidder after due notice; and sections 696 and 697 prohibit a city from contracting for the extension of its water system without approval of its citizens, and, in case an indebtedness was incurred, require the assent of three-fifths of the voters of the town. A city, without submitting the question to the voters, contracted to buy a part of the water system and pipe lines constructed by the state, after the expiration of a certain time, and to supply the State Agricultural College with water, but refused to carry out the agreement to purchase. *Held*, that the agreement was *ultra vires* and void.

Void Contract—Ratification—Plea of Ultra Vires—Estoppel.—Where a city contracted to use a water system a certain number of years, and to buy it at the end of the term, without submitting the question to the

*See Mayor of Nashville *v.* Sutherland (brief), 19 L. R. A. 619, and *note*; Huron Waterworks Company *v.* City of Huron (brief), 30 L. R. A. 650; *note*, 5 Mun. Corp. Cas. 725 *et seq.*

voters of the city, as required by 1 Hill's Code, § 696, the city was not estopped, by accepting the benefits of the contract, from setting up a plea of *ultra vires*, in an action for its breach, since the contract was void *ab initio*, and incapable of ratification.

Appeal from superior court, Whitman county; William McDonald, Judge.

Action by the state against the city of Pullman. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

P. H. Winston, T. M. Vance, and Alex. M. Winston, for appellant.

V. E. Bull, for respondent.

DUNBAR, C. J. This action was brought to recover the sum of $2,171.36, for damages alleged to have been sustained by plaintiff, the state of Washington, by reason of the failure of the defendant, the city of Pullman, to purchase certain pipe in accordance with the contract set up in the amended complaint. The regents of the Agricultural College, Experiment Station, and School of Science of the state of Washington entered into a contract with the city of Pullman, through its mayor, that the college or the state would construct a reservoir on a point of land in the rear of the college, of 250,000 gallons capacity, lay a six-inch main therefrom to connect with the town pump of the city of Pullman, give to the town the use of said reservoir and pipe, and also give to the town the right to buy the said main at actual cost of laying the same, a certain monthly stipend for pumping the water for the use of the college, and a certain number of cents per gallon for water used for irrigation. At the end of the term for which the contract ran, the city refused to buy the plant, and this action was brought by the state to recover the value thereof, which was alleged to be $2,171.36. Demurrer was interposed, which was overruled, and the city answered, pleading want of consideration, that the contract was ultra vires, and other defenses. With the view we take of the question of whether or not the city exceeded its power in entering into this contract, it will not be necessary to enter into a discussion of the question of whether the regents has a right to bind the state or bring this action in its behalf.

The contract is too long to set forth at length in this opinion, but, in substance, it was a promise on the part of the city to supply the college with water at a specified rate, and a promise to buy from the state a portion of the water system or pipe lines from the west line of the state lands to connect with the town water system, to enable the town to supply water to persons without the limits of the town. Section 683, 1 Hill's Code, provides that in the erection, improvement, and repair of all public buildings, works, etc., when the expenditure required for the same exceeds the sum of $100, the same shall be done by contract, and shall be let to the lowest responsible bidder, after due notice, under such regula-

tions as may be prescribed by ordinance. If this transaction was simply a commercial transaction, it was beyond the power of the city authorities to enter into the contract, under the provisions of the section just quoted. There was no power in the regents of the college, as agents of the state, to make a contract to erect a water system and sell it to the town. Neither did the town of Pullman have any authority to enter into a contract to supply water to any person or corporation beyond its limits, or to construct a water system for the benefit of any other person than itself or its inhabitants. Under the provisions of sections 696, 697, Id., the law which was in force at the date of the contract, the town was prohibited from contracting for the extension of its water system without the approval of its citizens; and, where the extension or addition created an indebtedness,—and in this case an indebtedness was contracted for,—it required the assent of three-fifths of the town. So that there can be no question but that the action of the town authority in entering into this contract was beyond the powers given it by law. In such case it is well settled that the plea of ultra vires may be interposed.

In the discussion of this question, the distinction which is made between the application of the law to private corporations and its application to municipal corporations must be kept in mind, and this will eliminate from the discussion the most of the authorities cited by the appellant. This distinction is wisely maintained, for the authority of a private agent is known only to the agent and the principal, but the authority of the officers of a municipal corporation is a matter of public record, which is available to every one. The scope of their authority is embraced either in their charters or in the statutes of the state, and the limitation upon their powers is equally available to every one who desires to deal with them. Hence, if one, knowing their powers and limitations, sees fit to enter into illegal contracts, contracts which the law has forbidden for the protection of the taxpayers of the municipality, he has no right to complain when he is estopped from enforcing his illegal contract by a plea of ultra vires by the citizens of a municipality. If he knew the law and contracted in the face of that knowledge, he certainly ought not to recover. If he did not know the law as matter of fact, he is subject to no greater hardship than has always been imposed upon the citizen, viz. the denial of the right to plead ignorance of the law on the theory that it was his duty to know it.

It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers

cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of ultra vires, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract. The most of the cases cited by the appellant, as we indicated before, were cases of private corporations. The appellant cites Hitchcock v. Galveston, 96 U. S. 349, 24 L. Ed. 661, in support of its contention. This is a case which falls within the rule announced above, and the city was proceeding within its powers, but in an irregular manner. In speaking of the claim that the city had exceeded its power, the supreme court of the United States in its opinion says: "Another objection to the validity of the contract urged by the city is founded upon a provision of the charter that the council shall not borrow for general purposes more than $50,000; and it is said the contract, if valid, creates a liability of the city exceeding that sum. This, however, does not appear in the contract itself, and this, perhaps, is a sufficient answer to the objection. But the limitation is upon the power to borrow money, and to borrow it for general purposes. It implie that there may be lawful purposes which are not general in the sense in which that word is used in the charter. An examination of the whole instrument, and of the numerous and large powers conferred upon the council, as well as duties imposed, makes it evident that the provision could not have been intended to prohibit incurring an indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the citv." There are some remarks in this opinion that give color to the contention of the appellant; but that the supreme court of the United States did not intend to lay down the rule that, when a city exceeded its powers in a contract made by the authorities, the plea of ultra vires could not be successfully interposed, is made evident by a subsequent case from the same court, viz. Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, wherein is pointed out the distinction between actions arising on contracts made by a corporation in excess of its corporate powers and actions against coporations for injuries caused by tortious acts done by its agents in the course of its business and of their employment in excess of its powers. In that case it was held that the city could not escape taxes due on its property, whether acquired legally or illegally, and could not make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business. And, in answer to the contention of appellant in that respect, the court said: "It remains to be observed that the question of the liability of corporations on contracts which the law

does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practiced on him. The powers of these corporations are matters of public law, open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong,—cases where corporations have been sued on contracts which they have successfully resisted because thev were ultra vires." It is true that the court, continuing, says: "But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use,"—citing Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Chapman v. Douglass County, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378. But an examination of those cases shows that the general rule announced by the court above had had not been impinged upon.

The law is announced by Mr. Dillon, in his work on Municipal Corporations, § 457 (4th Ed.), in a manner so concise and explicit that we cannot do better than to give it room in this opinion. It is as follows: "The general principal of law is settled, beyond controversy, that the agents, officers, or even city council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that contracts not authorized by the charter or by other legislative act—that is, not within the scope of the

powers of the corporation under any circumstances—are void, and in actions thereon the corporation may successfully interpose the plea of ultra vires, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract,"—citing authorities too numerous to reproduce. And if anything were wanting to elucidate the wisdom of the text announced, or to show the pernicious results of tolerating the practice indulged in by municipal authorities to exceed their legal powers, the history of the cities of the Pacific Coast furnishes the instance, where, under the stimulus of rivalry in the growth of cities, obligations have been incurred which have bankrupted the cities and impoverished the inhabitants by excessive taxation rendered necessary to meet such obligations.

In Brady v. City of New York, 16 How. Prac. 432, it was held that, where the contract under which work was done was void because entered into in violation of the charter, the contractor could not recover for the work in any form, neither under the contract nor as upon a quantum meruit, and that the subsequent ratification of the contract by the common council, whether before or after the work was done, did not make it binding on the corporation. It was further held that, where the officers of a corporation do an act in excess of the corporate power, the corporation is not bound, and, when the statute under which the corporation acts restricts its action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed. This is a very instructive and well-considered case. In Mayor, etc., of Baltimore v. Reynolds, 83 Am. Dec. 535, it was held that a person dealing with agents who act under special or express authority, whether written or verbal, is bound at his peril to know what the power of the agent is, and to understand its legal effect, and, if the agent exceed the boundary of his legal powers, the act, as far as it concerns the principal, is void. The authorities are collated and distinguished in this case, and, in answer to the plea of hardship, the court quotes from Lee v. Munroe, 7 Cranch, 370, 3 L. Ed. 374, where it is said: "It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it would be very difficult for the public to protect itself." In fact, the rule is so universal that it seems unnecessary to cite further authority.

But we are not without precedent in our own decisions. In Arnott v. City of Spokane, 6 Wash. 442, 33 Pac. 1063, it was held, in common with universal authority, that, wherever a person enters into a contract with an agent of a municipal corporation, he must, at his peril, ascertain the extent of such agent's authority, and, if he fails to do so, he alone must suffer the consequences. It was also said: "The power to ratify a particular contract presupposes the power to make it

in the first instance, and, if it is such that it could not be made orginally except in a certain prescribed mode, where that mode is disregarded the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation,"—citing Zottman v. City and County of San Francisco, 20 Cal. 97; Pavement Co. v. Painter, 35 Cal. 704; McPherson v. Foster, 43 Iowa, 48; City of Bryan v. Page, 51 Tex. 532. In Chehalis County v. Hutcheson, 21 Wash. 82, 57 Pac. 341, a case where a great hardship was worked upon the appellant by the application of this rule, where the appellant was a school superintendent for Chehalis county, and had visited schools under a statute which allowed a certain compensation therefor, but which statute was afterwards pronounced unconstitutional by this court, it was held that the county would not be estopped from disputing the validity of the warrants which had been issued in payment of such claims, for the reason that the contract would be void ab initio by virtue of the original lack of authority upon the part of the commissioners. The court announced, as the reason of the rule which governs the decision in this case, that the acts of the officers were unauthorized and void, and that one dealing with them was bound to take notice of the extent of their powers; citing 2 Herm. Estop. p. 1365, to the effect that "the true principle in such case is well settled that one cannot do indirectly what cannot be done directly, and where there is no power or authority vested by law in officers or agents no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts." In the case at bar there was no power on the part of the municipality to enter into this contract. The power was conferred upon the voters. The city had authority only to put the machinery in motion which would elicit and determine the will of the voters. The discretion and authority were conferred upon the voters, and not upon the officers of the city. Affirmed.

REAVIS, FULLERTON, ANDERS, and WHITE, JJ., concur.

RYAN *v.* CITY OF DUBUQUE.

(*Supreme Court of Iowa, Oct. 20, 1900.*)

[83 N. W. Rep. 1073.]

Written Contract—Quantum Meruit.*—Where work is done under a written contract, no recovery therefor can be had on a *quantum meruit.*

*See *note*, 5 Mun. Corp. Cas. 739–741.

Ryan v. City of Dubuque

Same—Construction of—Particular Custom.—Where a contract for grading a city street for a fixed sum estimates the amount of grading in cubic yards, and provides that in case of a change in the grade of the street, which shall change the amount of grading required, the amount of compensation shall be increased or diminished in the same proportion, the term "amount," in the phrase "amount of grading," will not be construed to mean cost, under a custom of contractors in a particular city, since the word has a well-defined popular meaning, and was used in relation to amount of work.

Same—Same.—A contract for grading a city street made provisions for both cutting and filling, in order to bring the street to an established grade, and provided that the grade might be changed, and in such case the price to be paid was to be increased or diminished according to the change in the amount of grading required. The grade was changed, which caused more cutting and less filling than was required by the original grade. *Held*, that, in computing the change of compensation resulting from such change of grade, the contractor was entitled to charge separately for both cutting and filling, though the materials taken from the cuts were used in making the fills.

Same—Same.—The provision in the portion of such contract relating to the disposition of excess of dirt excavated over that used in the fill, that the quantities in excess, only, shall be estimated, does not have the effect of only allowing one payment for the dirt excavated in cutting, and used in the fills.

Appeal from district court, Dubuque county; M. C. Matthews, Judge.

Action to recover balance due upon grading contract. Demurrer to the petition was sustained, and it dismissed. The plaintiff appeals. Reversed.

See Ryan v. City of Dubuque, 106 Iowa, 313, 76 N. W. 703.

McCarthy & Kenline, for appellant.

Duffy & Maguire, for appellee.

LADD, J. The grading was done under a written contract, and for this reason no recovery can be predicated on a quantum meruit, as was sought in the second count of the petition. The first count is included in the third, and attention may be limited to the latter. That part of the specifications involved only, with the estimate attached, need be set out:

"Estimated amount of grading { Cut, 5,574 cubic yards. Fill, 19,142 " "

* * * * * * *

"Grading.

"Said Southern avenue shall be brought to the proper grade line as directed by the city engineer. The filling shall be of sand, clay, earth, or gravel. When excavation is in excess, all material not needed in the construction or protection of the work shall be hauled and deposited in such place, and left in such manner, as the engineer or street committee may direct. The distance hauled shall not exceed 2,500 feet. Quantities in excess, only, will be estimated. All material to belong to the city. Grading to be bid in total. The grading is estimated from an established grade of said street, as shown by profile, cross section, and level notes, on file in the city

engineer's office. The city reserves the right to change the grade of said street, thereby increasing or diminishing the amount of grading as estimated; and if, from any change of grade or other cause, the amount of grading is changed, then the amount due and to be paid under this contract shall be increased or diminished in same proportion."

The plaintiff's bid was $2,679.60. He has been paid $1,201.20, and in this action seeks to recover the balance. During the progress of the work, changes were made by the engineer, which increased the amount of excavation to 8,464 cubic yards, and diminished the amount of filing to 5,880 cubic yards, and thereby greatly enhanced the expense of performing the contract, as the cost of cutting was about seven times that of filling. Compensation is claimed by plaintiff according to this increased cost of the grading done, and, if this be not allowable, then in proportion the grading done bears to that estimated. The city insisted that under the contract a cubic yard of earth excavated and used in filling should be counted but one cubic yard of grading, and that, so computing, the plaintiff had been fully paid. This appears to have been the view taken by the district court in sustaining the defendant's demurrer.

1. The rate of compensation in event of a change in grade is very clearly fixed by the specifications. It was to be increased or diminished in that proportion the amount of grading done bore to that estimated. There is no ambiguity or room for misunderstanding in the language employed. True, plaintiff avers that the word "amount," in the phrase "amount of grading is changed," contained in the contract, has a customary meaning among contractors at Dubuque, when used in grading contracts relating to different classes of work, as work, value, or cost, as distinguished from quantity or number of cubic yards, and that the parties to this contract so understood it. But these are very simple words, each having a popular and well-defined meaning, not similar to the other; and it is somewhat remarkable, if true, that the contractors of that locality should so pervert the English language, without conceivable excuse for so doing. Conceding this to be possible, however, the language of the specifications precludes such a conclusion. There the amount of grading is in fact estimated in cubic yards, and to the amount of grading as thus estimated the phrase mentioned unmistakably refers. To say that, under such circumstances, "amount" means cost, value, or work, is to impute a meaning contrary to the evident sense intended, the context, and its ordinary use. That this may not be done is conclusively settled by authority. Willmering v. McGaughey, 30 Iowa, 205; Cash v. Hinkle, 36 Iowa, 624; Silberman v. Clark, 96 N. Y. 522; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896.

2. The word "grading" includes cutting as well as filling. Technically it is the reducing of the surface

of the earth to a given line fixed by the city as the grade, and may involve filling or excavating, or both, as shall be necessary to accomplish that object. As said in Smith v. Washington Corp., 20 How. 135, 15 L. Ed. 858, "Hills must be cut down, and hollows filled up, or, in other words, the road be graded or 'reduced to a certain degree of ascent or descent,' which is the proper definition of the verb 'to grade.'" It will be observed that both the cut and the fill were included in the "amount of grading," as estimated and contained in the specification; and this phrase, when used in the body of the contract, must be accorded the same meaning. That was evidently the intention of the parties. Separately considered, the amount excavated was a part of the grading, regardless of the place to which the earth was taken; and so of the fill, no matter from whence the earth came. And it would seem that, where both are mentioned as making up the "amount of grading," both should be measured, in determining the compensation stipulated therefor. It may be that, as held in City of Leavenworth v. Rankin, 2 Kan. 357, where compensation for grading is to be by the cubic yard, and all the earth excavated is used in filling, it should be measured but once. But here compensation is based on the entire "amount of grading," which, according to the specifications and the contract, included both the excavation and fill contract. The parties having employed the phrase as including both, it should be so treated in estimating the price to be paid for the work actually done. But the defendant asserts that the method of compensation is fixed by the contract, in providing that "quantities in excess only shall be estimated." That is, as in the estimate the filling is the more, and, in the grading done, the excavation was the greater, payment should be that part of the original price that the latter is of the former. This sentence follows provisions relating to the excess of material excavated over that necessary for filling, together with the place to which it is to be hauled, and the distance, and is just before the reservation of such material by the city. To such excess it evidently refers. The wording indicates that a difference was intended, and not the greater of two numbers. While the purpose of the sentence, in its connection, is not clear, it cannot be construed as meaning the total amount of excavation or deposit, as contended, without materially enlarging its purport. The excess of the cut over the fill is the one less the other, and not the larger,—is the difference between the amount of earth placed upon that taken off the entire surface in making the improvement. Besides, it is evident from the subsequent conditions that, in determining what proportion of the amount bid should be paid in event of a change, the grading actually done and that estimated, which, as we have seen, included both the cut and fill, were to be considered, and compensation made accordingly. Without

adding to the contract, it cannot, in the absence of any averment of custom or usage, be accorded the meaning contended for by appellee. The plaintiff is entitled to that proportion of his bid that the total amount of excavation and filling bears to the total amount estimated. Reversed.

GRANGER, C. J., not sitting.

SMEDLEY *et al.* *v.* CITY OF GRAND HAVEN.

(*Supreme Court of Michigan, Dec. 31, 1900.*)

[84 N. W. Rep. 626.]

Contract by Mayor*—Consent of Council—Action—Mandamus—Certiorari—Jurisdiction.—Plaintiff, an attorney, began mandamus proceedings against the clerk of the common council of defendant city to compel him to issue a warrant for attorney's fees allowed by vote of the mayor and four members of the common council as expenses in prosecuting certain mandamus suits for the mayor. The case was removed by *certiorari* to the supreme court, and with it were sent the files and proceedings in another mandamus suit, brought by the four remaining aldermen against the mayor to set aside his action in voting on such allowance of attorney's fees in his own favor. This latter suit, in which plaintiff had defended the mayor, had never been removed to the supreme court. Plaintiff sued to recover for legal services rendered the mayor in the circuit court and supreme court in defending the mandamus suit of the aldermen against him. *Held*, that plaintiff could not recover for services rendered therein in the supreme court, since the case had not come before that court.

Same—Hiring Special Counsel—Emergency—Question for Jury.—An attempt was made by the common council of a city, acting under the city attorney's advice, to transfer certain money of the city from one fund to another in violation of the city's charter. The mayor vetoed the resolution therefor, but the council's clerk refused to file the veto message. Mandamus proceedings were begun by the mayor against the clerk and common council to compel its filing, and the mayor was sustained. Other suits arising from these matters were brought both by and against the mayor, in all of which the city attorney was actively opposed to him. The mayor employed plaintiff as legal counsel in this suit, who seeks to recover for services rendered under such employment. *Held* that, under these facts, it was error to direct a verdict for defendant, since it was a question for the jury whether there was such an emergency as would justify the mayor in employing counsel, without the consent of the city council, required by the charter, so as to make the city liable for attorney's fees thereby incurred.

Error to circuit court, Ottawa county; Philip Padgham, Judge.

Action by Charles O. Smedley and another against the city of Grand Haven. Judgment for defendant, and plaintiffs bring error. Reversed.

Smedley & Corwin, in pro. per.
Walter I. Lillie, for appellee.

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*See *note* to Holder *v.* City of Yonkers, 1 Mun. Corp. Cas. 167; City of Chicago *v.* Williams, 3 Mun. Corp. Cas. 110; Mayor of Nashville *v.* Sutherland, 19 L. R. A. 619, and *note*; Huron Waterworks Co. *v.* City of Huron, 30 L. R. A. 848; State *v.* City of Pullman, *ante*, p. 299.

Smedley *v.* City of Grand Haven

LONG, J. This is an action of assumpsit to recover for legal services claimed to have been performed by Charles O. Smedley for the city of Grand Haven, and such claim assigned to plaintiffs. The case was tried before a jury, who returned a verdict of no cause of action, by direction of the court. The bill of particulars is set out in the record. About $130 of the claim is for services rendered the city in the case of Bishop v. Baar, mayor of defendant city, in the circuit court for the county of Ottawa. The balance of the claim is for legal services rendered by Mr. Smedley in this court, the two claims amounting to $340.42. It appears that the council of defendant city attempted, by resolution, to transfer certain of the city moneys from one fund to another. The mayor prepared a veto message, and the clerk refused to file the same, claiming that it came too late into his hands to be effective. Mandamus proceedings were commenced in the circuit court to compel the clerk to file it. The case was ruled in the circuit court against the mayor, and was removed by the mayor to this court. Mr. Smedley was employed by the mayor to represent him in that case, both in the circuit court and in this court. The order of the circuit court was reversed in this court. Baar v. Kirby, 118 Mich. 392, 76 N. W. 754. The mayor at the time of filing the petition for mandamus in that case in the circuit court also filed another petition for mandamus against the city council. That case was decided in favor of the mayor, and the case ended in that court. After the decision in this court of Baar v. Kirby, supra, Mr. Smedley presented his bills to the common council of the city for such legal services in the two cases,—one, Baar v. Kirby; and the other, Baar v. Common Council. These bills were referred to a finance committee, to which committee was added the city attorney. The committee recommended to the council that an order be drawn on the contingent fund in favor of the mayor to repay him for the tax cost in the Kirby Case, $37.80, and for all other legal expenses $50, making a total of $87.80, and that nothing be allowed Mr. Smedley for legal services. When this recommendation was read to the council, one of the aldermen moved that the mayor be allowed $349.50 with which to pay his attorney's fees in his mandamus case against the clerk. The vote was a tie in the council, and the mayor then voted in the affirmative, thus carrying the motion. Proceedings were then commenced against the mayor by four of the aldermen to compel him to determine that the resolution had not been carried, claiming that he had no legal right to vote on the question. That case is entitled, "Bishop v. Baar." Upon the coming in of the answer to show cause in that case in the circuit court, issues of fact were framed, and testimony was taken thereunder. A mandamus was issued from the circuit court in the case, setting aside the action of the mayor in voting on said bills. In the meantime the clerk of the council was instructed by the four aldermen and the city attorney

not to draw a warrant for the amount of the bills so allowed at $349.50. Mr. Smedley thereupon commenced mandamus proceedings against the clerk to compel him to issue the warrant for the amount of the claims allowed. That case was determined in the circuit court against Mr. Smedley. He removed the same to this court by certiorari, and the case was here reversed, and the mandamus issued to compel the clerk to sign the warrant for the claim as allowed by the four aldermen and the mayor voting thereon. 79 N. W. 187. When the return was made by the circuit court to the order to show cause in Smedley v. Kirby, there was sent with the return all the files and proceedings in the case of Bishop v. Baar, though that case was never removed to this court. That case is referred to in Smedley v. Kirby. The clerk issued the warrant for the $349.50, and the same has been paid. It appears that during all these proceedings the city attorney was antagonistic to the mayor. He appeared as counsel in every proceeding in the circuit court and in this court in opposition to the mayor. It was under his advice as a member of the finance committee that the council refused to allow the account in favor of the mayor. At the close of the testimony in the present case the court directed the verdict in favor of the defendant. We have set out very fully the facts in the case upon which the legal questions are raised. The testimony shows, as stated by the court below, that there was no concurrence by the common council with the action of the mayor in the employment of Mr. Smedley, except that the mayor spoke to them individually about such employment, and they said it was all right. It is also shown, as stated by the court, that the case of Bishop v. Baar was not appealed to this court; but it does appear that, when the circuit court made a return to the certiorari in Smedley v. Kirby, he returned all the proceedings had before him in Bishop v. Baar. The claim of the plaintiffs in the present case is for services in Bishop v. Baar in the circuit court and in this court. Plaintiffs, in their bill of particulars, treat the case of Bishop v. Baar as for argument in this court. That case was not in this court, and the court below was not in error in holding that the plaintiffs could not charge for that. As was said by the court below, Mr. Smedley used it only in support of his own case of Smedley v. Kirby. He has been paid in that case, and must rest satisfied with his taxable costs of both courts in the case.

The question remains as to the claim for services in Bishop v. Baar in the circuit court. The charter of the city of Grand Haven provides, by chapter 8, § 20 (Laws 1895, p. 416) that: "The council shall audit and allow all accounts chargeable against the city, but no account or claim or contract shall be received for audit or allowance unless it shall be accompained with the certificate of an officer of the corporation, or an affidavit of a person rendering it to the effect that he verily believes that the services therein charged have been actually

performed, or the property delivered for the city. * * * It shall be a sufficient defense in any court to any cause of action or proceeding for the collection of any demand or claim against the city for personal injuries or otherwise that it has never been presented certified to or verified as aforesaid to the council for allowance; or, if such claim is founded on contract, that the same was presented without the affidavit or certificate as aforesaid and rejected for that reason, or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it." The court refers to this charter, and says: "If a debt is to be contracted against the city in any way, it must come through the power of the common council." It is admitted by the learned judge that there are certain exceptions to this rule, as where an emergency or exigency might arise which would compel the mayor to act without the sanction of the council in order to protect the rights of the city; but the court was of the opinion that no such exigency was shown to exist in the present case. No point is made by the court below or by counsel for the city that the account was not certified as required by the above provisions of the charter. The only question presented is whether there was any exigency arising in the case which called upon the mayor to act without reference to any formal action by the council. The city attorney was employed against the mayor in all the cases, and in fact was active against him in all the matters coming before the council pertaining to the transfer of the funds, the veto message, the bringing of the mandamus proceedings, as well as in advice to the council not to pay the cost and expenses in the suits. We think it was a question for the jury to determine whether any exigency existed which warranted the mayor in employing counsel under such circumstances. The charter of the city, by section 1, c. 7, provides that the mayor shall be the chief executive officer of the city, and "it shall be his duty to exercise supervision over the several departments of the city government, see that the laws relating to the city and ordinances and regulations of the council are enforced." The mayor found that the council, by resolution, had violated the provisions of section 22, c. 30, of the charter, which provides that: "All moneys and taxes raised, loaned or appropriated for the purposes of any particular fund shall be paid in and credited to such fund, and shall be applied to the purposes for which such moneys were raised and received, and to none other; nor shall the moneys belonging to one fund be transferred to any other fund, or be applied to any purpose for which such other fund is constituted," etc. In the face of this provision, the counsel attempted by resolution to transfer $7,000 from the contingent to the several city funds. His attempt to veto this action was opposed by four of the aldermen and the city attorney, acting with them, and they sought to defeat the

veto message on the ground that it was not filed in time. It appears in the case of Barnett v. Mayor, etc., 48 N. J. Law, 395, 6 Atl. 15, an action was brought by the mayor of the city of Paterson to recover moneys expended by him in employing legal counsel in defending a mandamus suit brought by the city against him. The mayor was successful in the mandamus case. It was said by the court: "If he was right in his judgment, the city should have furnished him the aid of proper counsel. But the official law officer was in court against him, and the city authorities, to whom ordinarily he should have applied, were the real actors in the proceedings against him. It would, under these circumstances, have been idle to make the application. Ordinarily his duty would have ended with an unsuccessful application to the official counsel, or, if the city counsel were not available, then by application to the appropriate authority to furnish other counsel; but he could expect aid from neither source in the existing situation. He was chargeable with the knowledge of his official duty, and was called upon to decide what was the course of action which that duty demanded of him. The risk of decision was upon him. If he erred in judgment as to his legal duty in resisting the proceedings, he must, on demanding to be reimbursed his outlay, have stood as a mere volunteer, and borne the direct consequences of defeat. The judgment of the court which the parties invoked vindicated his decision, and found him acting in obedience to the demands of the charter." The above case was quoted with approval in Wiley v. City of Seattle (decided in 1894) 7 Wash. 576, 35 Pac. 415. In City of Louisville v. Murphy, 86 Ky. 53, 5 S. W. 194, an action was bought by members of the city to restrain the collection of a claimed illegal tax. The council did not move in the matter, and the city attorney took no steps in it. In this emergency the mayor employed counsel, and the court sustained his claim. It was held that the mayor had the right to do this, under such circumstances, and that the city was liable for the expenses of counsel and attorney fees.

Plaintiff asked the court to charge the jury that if they found, under the circumstances shown, that the mayor was justified in the employment of counsel to represent him in these cases, the verdict should be for plaintiff. This was refused, and the court directed the jury to return a verdict for defendant. This charge was erroneous. The jury should have been instructed that, if they found such an emergency existed, the only question left for determination was the amount to which plaintiffs were entitled in the case of Bishop v. Baar in the circuit court. The judgment must be reversed, and a new trial granted. The other justices concurred.

CITY OF DENVER *v.* WEBBER.

(Court of Appeals of Colorado, Dec. 10, 1900.)

[63 Pac. Rep. 804.]

City Council—Implied Powers—Hiring Special Counsel.—A town council, not being expressly restricted by legislation, has power to employ special counsel to appear in litigation arising out of proceedings to annex the town to a city, though there is a town attorney whom the council has required by resolution to represent the town in all legal proceedings in which it may become involved.

Same—Power to Contract*—Irregularities—Ratification.—Every resolution or order to enter into a contract by a board of town trustees required the concurrence, by a yea and nay vote, of four of the six members of the council. A resolution authorizing an attorney to appear as special counsel for the town in annexation proceedings received only three votes to two against it. At the same meeting, and immediately after the first resolution, the clerk was instructed, by four yeas and one nay vote, to send a certified copy of the resolution to the attorneys who appeared before the council, and advised with them as to the proposed proceeding, and, by four yeas to two nays, a warrant was ordered drawn in favor of the attorney for an amount to apply on costs and fees in the suit. *Held*, that, if an express contract was not properly entered into, the subsequent acts of the council ratified the contract of employment.

Same—Same—Construction of Statute.—2 Mills' Ann. St. § 4449, providing that no contract shall be made by town trustees unless an appropriation shall have been previously made for the expense thereby created, refers only to the making of such contracts as may be necessary in carrying out powers expressly granted, and not to the exercise of implied powers necessary to carry out powers expressly granted, and no appropriation other than the annual one being made, except on submission to a vote of the electors, a contract by the town council for the employment of special counsel in litigation arising out of proceedings to annex the town to a city was proper without a prior appropriation for the expense.

Appeal from district court, Arapahoe county.

Action by Dewitt C. Webber against the city of Denver. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. C. Norris, Emerson J. Short, Jas. M. Ellis, City Atty., and Guy Le R. Steavick, for appellant.

Geo. Q. Richmond, for appellee.

WILSON, J. Plaintiff sues to recover from the defendant city the value of legal services rendered by him under an alleged appointment by the town of Colfax as special counsel in litigation arising from proceedings for the annexation of said town to the city of Denver. No question is raised as to the rendition of the services nor their value. Neither is there any question as to the city of Denver being the proper party defendant, the annexation having been complete. Counsel for defendant very properly suggest in their briefs that the assignments of error are embraced in, and may be discussed under, three heads: (1) There was no prior appro-

*See cross references to preceding case, p 309.

priation covering the expense; (2) there was no valid contract of employment of the plaintiff; (3) the town council did not have authority to employ the plaintiff. We shall consider these questions in the inverse order of their presentation.

1. Towns and cities, from a very remote period of time, have been invested to some extent with local jurisdiction. In Rome municipal corporations existed and were recognized and provided for by Roman law. Then, as now, they were created in furtherance of the principle of local self-government. Their objects then, as now, were to invest them with such powers, and impose upon them such duties, as might be necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience, of their inhabitants. These are expressly declared by the statute of this state to be the primary objects and duties of such corporations. Gen. St. § 3313; 2. Mills' Ann. St. § 4431. As a broad general rule, such corporations are entitled to exercise only the powers with which they are specifically invested by the legislative authority which creates them. It being impossible, however, for the legislature to foresee and provide for every contingency which might arise in the government of a town or city, it has long since been settled, and is now the universal rule, supported by an unbroken line of authority, both in England and America, that such corporations can also exercise those powers necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation, so as to enable it to discharge the duties expressly imposed upon it, and exercise the powers granted in express words. One of these powers, necessarily and plainly implied and clearly essential to the proper discharge of its duties, is, in the absence of express legislative restriction, the power to employ special counsel to appear in litigation in which it may be involved, when, in the exercise of a reasonable discretion, the interest of a municipality may require it. This results from the power with which the corporation is invested to make contracts, to own property, and to incur liabilities, in the exercise of which the corporation is liable at any time to be involved in litigation in courts where the respective rights of the parties must be ultimately determined. 1 Dill. Mun. Corp. (4th Ed.) § 479; Rice v. Gwinn (Idaho) 49 Pac. 412; Smith v. Mayor, etc., 13 Cal. 532; City of Memphis v. Adams, 9 Heisk. 526; Tied Mun. Corp. § 176. As aptly said in Smith v. Mayor, etc., supra: "The duty of protecting the public property carries along with it the duty to employ the usual means of protecting it. Legal assistance stands as a means for the protection of property in direct relation to the general power to hold, acquire, preserve, and protect it." And this is true, even where the corporation has its regularly elected or appointed attorney. Smith v. Mayor, etc., supra; Tied. Mun. Corp. supra. In this state there is

no restriction upon such appointment by statute. The latter simply provides that a board of trustees of an incorporated town shall appoint a town attorney, and shall prescribe the duties of his office. The city relies, however, in this case, upon a resolution of the board of trustees of the town of Colfax, which attempted to specify the duties to be performed by the town attorney, and, among other things, required that he should "represent the town in all legal proceedings before any and all courts of the state in which it may become involved." This did not, either in terms or by implication, exclude the employment of other counsel. If the contention of defendant be correct, a most anomalous condition of affairs would exist. Litigation of great importance to the municipality might arise, involving large interests, and, even though it might be deemed patent that the town attorney should and ought to have assistance, the municipality would be powerless to act. Again, the town attorney might fail or refuse to appear for or represent the town, and yet it could do nothing to have the important interests of its people looked after and represented in the courts by the only person whom it could have,—a licensed attorney at law. Surely, it was never the intention of the legislature to permit such a condition of affairs to be brought about. Indeed, in this case it was alleged in the pleadings, and not denied, that the town attorney appeared in the courts in behalf of the protestants against annexation, which had been approved by a majority vote of the people of the town and by the board of trustees. Should the board of trustees have quietly acquiesced, and seen their own wishes, and the wishes of the people for whom they were trustees, thwarted? The question suggests its own answer in reason, common sense, and in law. If such were the case, the employee would be more powerful than the employer. There would be no need of a board of trustees in much of the important business of the corporation, the town attorney being invested with the sole power and authority to bind the corporation and its people in all litigated matters. Besides, the town attorney of an incorporated town holds his position solely at the will and pleasure of the board of trustees. He may be, at any time, by either ordinance, resolution, or any form of corporate action showing clearly the intent of the corporate authorities, devested of any or all power, and relieved from the discharge of any or all duties, theretofore imposed upon him. We think it beyond dispute that the corporate authorities of the town have, in proper cases, the implied power to employ special counsel in its litigation, being responsible only for a reasonable exercise of that power.

2. The next contention of defendant is that "there was no valid contract of employment of the plaintiff." This grows out of the following state of facts: The corporate authority of the town was invested in a board consisting of one mayor

and six trustees. Laws 1889, p. 454; 2 Mills' Ann. St. § 4508. The statute provides that, on the passage or adoption of every by-law or ordinance and every resolution or order to enter into contract by a board of trustees, the yeas and nays shall be called and recorded, and that there shall be necessary to its passage or adoption the concurrence of a majority of the whole number of members elected to the council. Waiving the question, which we do not decide, as to whether the employment of plaintiff in this case was such an entering into contract as was contemplated by the statute and intended by the legislature, we will consider it as if such was the case. The first action taken in the premises was at a meeting of the board of trustees, regularly convened, when a resolution was introduced which, after reciting that, at a special election held in the town, a majority of the legal votes cast was for annexation, and that the board of trustees had heretofore recommended to the county court that the report of such election, signed by the mayor and clerk, under the seal of the town, should be approved, it was resolved "that D. C. Webber, Esq., an attorney at law, is hereby authorized and directed to appear as sole and special counsel for this town in said proceeding, and on behalf of this town to consent to the approval of said report; and be it further resolved that George N. Hurd, be, and hereby is, relieved as attorney for the town of Colfax for the purposes herein set forth." The vote was taken by yeas and nays, there being three affirmative votes and two negative. If, therefore, this appointment was the entering into such a contract as contemplated by the statute which we have cited, then the resolution, having failed to receive four affirmative votes, clearly failed of adoption. It is well settled, however, that a municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of its corporate powers, and not ultra vires, and such ratification, as in the case of natural persons, is equivalent to previous authority. Town of Durango v. Pennington, 8 Colo. 257, 7 Pac. 14; Town of Bruce v. Dickey, 116 Ill. 534, 6 N. E. 435; Dill. Mun. Corp. (4th Ed.) § 463. At the same meeting at which the resolution above referred to was adopted by the vote stated, and immediately subsequent thereto, it was moved and seconded, as appears from the town records, that "the clerk be instructed to prepare a copy of the said resolution, and certify to the same, said copy to be sent to Attorney D. C. Webber." This motion carried by a vote of four yeas and one nay, and immediately subsequent to this, as the recorded minutes recite, "Attorney D. C. Webber, heretofore employed as special counsel to represent the town in the matter of the annexation of the town to the city of Denver, was present, and called the attention of the board" to various matters concerning the litigation, and made various suggestions as to what was necessary to be done. Immediately thereafter it again appears from the town record that, by a vote of four yeas

and two nays, a warrant was ordered drawn in favor of D. C. Webber for the sum of $100, "to apply on the cost and fees in the suit in which he had been employed." All these matters, occurring, as they did, at the same meeting of the board, were part and parcel of the same transaction, and are manifestly sufficient to constitute a ratification, under the most rigid rules applying thereto, even if an express contract was necessary for the employment of plaintiff, which we do not decide, and even if the first-mentioned resolution was intended to be such a contract. The trustees having authority to employ special counsel, and neither statute nor ordinance prescribing any particular method or form of procedure which they should resort to or follow in making such employment, or in entering into such contract, if express contract were necessary, their action might be taken, and be absolutely effective, by a vote upon a motion, or the adoption of a resolution, or by any other corporate action which might clearly manifest the intent, and which would be a matter of record. Board v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; City of Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503; Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518. We think, therefore, that ratification was complete and perfect, even if an express contract were required, and comes within the strict rule laid down by our supreme court in Town of Durango v. Pennington, supra, to the effect that to constitute the ratification of an invalid contract, where an express contract is necessary and where the contract is required to be made in a specified manner, requires the observance of the same formalities and provisions necessary to be complied with in the making of a valid contract. In this case, the only formality required, if at all, was that the matters relied upon to constitute ratification should have received four votes, being a majority of all the members elect. This was the case.

3. The remaining objection of defendant is that "there was no prior appropriation covering the expense." This is based upon the provision of the statute to the effect that no contract shall be made by the board of trustees of a town, and no expense shall be incurred by any of the officers or departments of the municipal corporation, whether the object of the expenditure shall have been ordered by the board of trustees or not, unless an appropriation shall have been previously made for such expense. Gen. St. p. 979; 2 Mills' Ann. St. § 4449. It is the duty of courts in construing a statute to do so in such a manner as to give effect, if possible, to the whole and every part of it,—such a reasonable construction as would tend to effectuate the purposes and objects of the statute, and carry out the intent of the legislature in its enactment. Applying this rule, and bearing in mind the multifarious duties, many of which it is impossible to foresee or anticipate, which devolve upon the governing bodies of municipal corporations, it seems

evident to us that the statute which we have cited refers only to the making of such contracts or the incurring of such expense as may be necessary in carrying out the powers expressly granted to the corporation by the statute, where contracts are expressly required, or where the nature and character of the work or act proposed is such as to seemingly require that an express contract should be entered into to protect the city's interest. We think it would be unreasonable to say that it applies to the exercise of all those implied powers necessary for the corporation to carry out the powers expressly granted. The trustees of incorporated towns are required, within the last quarter of the fiscal year, to pass an ordinance termed, "The Annual Appropriation Bill," for the next fiscal year, specifying the objects and purposes for which the appropriation is made, and it provided that no further appropriation shall be made during said ensuing fiscal year, unless the proposition therefor is first submitted to, and sanctioned by, a majority of the legal voters therein. It is a matter of common knowledge that conditions frequently arise in towns and cities which it was impossible to have foreseen a few weeks, much less months, beforehand, and which require immediate and prompt action on the part of the municipal authorities in order to protect the interests of the people. Can it be said that if a violent epidemic should break out, thereatening the lives of the inhabitants, the authorities would be powerless to incur any expense until they had first secured the sanction of a majority of the people? They are employed generally to do all acts, and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease. This provision might be entirely defeated if the contention of defendant be correct. Likewise, important property interests of the municipality might be involved, and an emergency arise requiring for their protection prompt action and the employment of an attorney. In such case, it would be the imperative duty of the trustees to act at once if the emergency seemed to so require. Authorities being empowered to protect the property of a municipality, we believe that the employment of an attorney would in such case be proper without the formality of a prior appropriation for the expense, which, by the way, it might be impossible to accurately estimate in advance, and without incurring the dangerous delay of waiting until the wishes of a majority of the legal voters could be ascertained. These views are not in conflict with any of the decisions of our supreme court, to which we have been cited by counsel. An examination of Town of Durango v. Pennington, supra, will disclose that it sustains the views which we have expressed, so far as at all applicable to this case, and unquestionably sustains the right of plaintiff to recover herein. In that case the town authorities, without the formality of a yea and nay vote, undertook and did enter into a written contract with a party to grade a cer-

tain street. The court held that the action upon this contract could not be maintained, because of noncompliance with the statute in its execution, but it called attention to the fact that the statute requiring a yea and nay vote upon a contract, and the concurrence of a majority elected as members of the board, before it could be entered into, specified no cases where contracts were required to be entered into, nor did the general incorporation act require that a street improvement like the one in question should be let out upon contract. It therefore held that by reason of this, and the fact that the statute authorized the board of trustees to make improvements of the character in question, to appropriate money for corporate purposes, and to provide for the needs and expenses of the corporation, there being no express regulation upon the subject, the defendant would be liable, under proper issues, for the reasonable value of the services rendered. In other words, the court held that suit could not be maintained upon the written contract, because it was not entered into in compliance with the requirements of the statute, but that no contract was necessary, and the town was liable for the reasonable value of the services rendered in a suit brought upon the proper issue. This, it seems to us, covers this case exactly. Sullivan v. City of Leadville, 11 Colo. 483, 18 Pac. 736, involved an alleged contract for grading and macadamizing streets, which was the attempted exercise of a power expressly granted in terms by the statute. For the reasons given, we think the objections raised and discussed by the city are untenable, and the judgment will be affirmed. Affirmed.

AVERY *et al.* *v.* UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit, Nov. 7, 1900.)

[104 Fed. Rep. 711.]

Purchase of Land for Streets—Power of Municipality to Acquire Fee* —Reversion.—A municipal corporation not restrained in this respect by charter or statute, has implied power to acquire an unqualified fee in land necessary for municipal purposes; and when it acquires land for street purposes by purchase, the reversion of such land to the grantor, upon the city's ceasing to use it for street purposes, depends upon whether he was devested of his entire interest by the instrument conveying the land to the city.

Same—Same—Construction of Deed.—In a deed of land to a city the words concluding the description, "as and for a public street of said city," were the only words which in any way distinguished the conveyance from an ordinary warranty deed to an individual. *Held*, that such words, without more, did not qualify the estate conveyed, and that such deed divested the grantor of every interest in the land, and prevented its reverting to him or his heirs upon the discontinuance of the street.

Same—Same—Same—Effect of City Ordinance upon Same.—The title to such land vested in the city by such deed was not affected by a subse-

*See *note* to Iron Mountain R. Co. *v.* Bingham, 4 L. R. A. 622; *note* to Moose *v.* Carson, 7 L. R. A. 548.

quent city ordinance made necessary by a statute providing that no street thereafter dedicated by its owner to public use should be deemed a public street so as to impose responsibility upon the city for its care and maintenance, "unless the same shall be accepted and confirmed by an ordinance specially passed for such purpose."

In Error to the Circuit Court of the United States for the Northern District of Ohio.

For former opinion, see 98 Fed. 512.

The questions arising upon this writ of error originate in a petition filed by the United States for the condemnation and appropriation of certain property in the city of Cleveland, Ohio, for the purpose of constructing a building for the use of the government as a post office, court and custom house. In 1856, Leonard Case was the owner of a lot of ground, part of original city lot No. 63, bounded on the east by Wood street, on the south by Superior street, on the west by the public square, and on the north by Rockwell street, having a front on Superior street of 214 feet 6 inches, and a depth of 200 feet. April 9, 1856, said Case, for a valuable consideration, conveyed to the United States, by absolute fee-simple deed with usual covenants, a part of said lot fronting on the public square 200 feet, and having a depth of 105 feet. This deed described the part so conveyed as follows: "Beginning at a post in the southwest corner of said lot; then northerly, on the easterly line of the public square and westerly line of said lot, about 200 feet, to Rockwell street, which is 66 feet wide; then easterly, on the southerly line of said Rockwell street, 105 feet, to a parcel of land 40 feet wide, which said parcel is dedicated for a street 40 feet wide, and to be opened by said Case; thence southerly, by the westerly line of said parcel of land mentioned, and parallel with the line of the public square, about 200 feet, to Superior street; then westerly, with Superior street, 105 feet, to the place of beginning." On the 18th of May, 1859, Case executed a deed to the city of Cleveland for a strip 35 feet wide, extending through from Rockwell to Superior street. This deed was in the usual words of a fee-simple deed, and contained covenants of seisin and warranty. The conveying clause, after describing the property, concluded with the words, "as and for a public street of said city," and upon these words and their import the present case hinges. This deed was recorded October 14, 1859.

Two ordinances of the city council were introduced as tending to show the consideration for the deed and the purposes of the grant. Both were passed October 18, 1859, and were in these words:

"Be it ordained by the city council of the city of Cleveland, that the dedication of the land specified in the deed from Leonard Case to the city of Cleveland, being a strip of land thirty-five feet wide, from Superior street to Rockwell street,

the westerly line of which thirty-five feet, is one hundred and five feet easterly from the easterly line of the public square, be. and the same is hereby, accepted and confirmed as a public street."

An ordinance to grant certain building privileges to William Case and Leonard Case, Jr.:

"Section 1. Be it ordained by the city council of the city of Cleveland, that in consideration of the conveyance to said city by Leonard Case, by a deed dated May 18, 1859, of a parcel of land lying east of the postoffice and between Superior street and Rockwell street, which land is hereby granted to William Case and Leonard Case, Jr., to occupy such a portion of the sidewalks on Superior street, Wood and Rockwell streets, and the land deeded as above mentioned, as may be necessary for the pilasters, areas and balconies for a block of buildings about to be erected by them on the vacant lot next east of the United States buildings, and bounded on the north by Rockwell street, on the east by Wood street, on the south by Superior street and on the west by a street thirty-five (35) feet in width. The outside of the main walls of said block is not to extend beyond the line of said streets, the pilasters, areas and balconies to extend into the sidewalks as shown on the ground plan, a copy of which is hereto attached.

"Sec. 2. That the owner thereof shall erect and keep in good repair a good iron railing around said areas, or suitably cover the same.

"Sec. 3. That the privileges granted in section 1 of this ordinance shall not apply in any other case than the one above mentioned.

"Passed October 18, 1859."

That part of the original Case lot, not included in the deeds above recited, was conveyed July 1, 1876, by said Case to a corporation known as the "Cleveland Library Association," now the "Case Library," by deed which called for said 35-foot street or place as a monument bounding the parcel conveyed on the west. The object of the proceedings begun by the United States was to appropriate the property so conveyed by Case in 1876 to the Case Library, as well as the 35-foot street or place so conveyed by him to the city of Cleveland, for the purpose of enlarging the present post-office site, and erecting thereon a new and much-enlarged public building. The defendants to the petition were the "Case Library" and its trustees, the city of Cleveland, and the heirs of Leonard Case, whom the petition alleged to claim some right, title, or interest in the parcel, which came subsequently to be known as "Case Place" or "Case Street." Issues were properly made up, and the value of the Case Library lot assessed by a jury, and no question is now made as to that. The jury assessed the damages sustained by the city of Cleveland, by reason of the appropriation of said "Case Place" for the

post-office purposes, at a nominal sum, of which no complaint is made. In reference to the right, interest, or title of the Case heirs, the court instructed the jury that the conveyance of Leonard Case to the city of Cleveland was absolute, and that no interest or reversion remained in them, and that they had no interest or estate, conditional or otherwise, and were entitled to no compensation. This writ of error is sued out by the Case heirs alone, who have assigned this instruction as error.

Lewis J. Wood and E. J. Blaidin, for plaintiffs in error.
Robert Tucker and John J. Sullivan, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The deed of Leonard Case to the Cleveland Library Association described the property as bounded on the west by "Case Place." If Leonard Case had any title, contingent or otherwise, to Case place, this call for Case place as a monument bounding the parcel conveyed to the library association would carry that title to the center of Case place, and this title would pass to the United States under the proceedings for the condemnation of the property of the library association. This has been conceded by counsel for the Case heirs, who have limited the controversy to the western half of the street which the government is seeking to appropriate.

2. The deed of April 9, 1856, to the United States for the lot now owned and occupied by the United States differed from the conveyance subsequently made to the library association, in that the easterly line of the parcel conveyed to the United States is described as running "with the westerly line" of Case street. We shall assume, for the purposes of this case, that, under the law of Ohio, a grantee holding under a conveyance which bounds his property by the west line of a street will take title only to the west line of the street, and not to the center thereof, as he would if the parcel had been simply bounded "by the street," or "along the street," or "upon the street." Lough v. Machlin, 40 Ohio St. 332; Lembeck v. Nye, 47 Ohio St. 336, 351, 24 N. E. 686, 8 L. R. A. 578.

3. Did the city of Cleveland acquire an unqualified fee in the parcel of land in controversy by virtue of the deed of Leonard Case of May 18, 1859? First, it is said that the city had not the capacity to take the fee. A municipal corporation, unless restrained by statute or charter, has the implied power to purchase and hold all such real estate as may be necessary to the proper exercise of powers specifically granted. 2 Dill. Mun. Corp. (2d Ed.) § 432; Ketchum v. City of Buffalo, 14 N. Y. 356; Beach v. Haynes, 12 Vt. 15; State v. Woodward, 23 Vt. 92; Reynolds' Heirs v. Commissioners, 5 Ohio, 204; Gall v. City of Cincinnati, 18 Ohio St. 563. So

it is competent for the legislature to authorize the appropriation of the title in fee to land taken for a public use, and if such a full appropriation is made, and the owner compensated, nothing remains in the owner, and he cannot claim additional compensation if the land shall be subsequently alienated or lawfully appropriated to a different public use. Cooley, Const. Lim. (5th Ed.) 692; Heard v. City of Brooklyn, 60 N. Y. 242, 247; Heyward v. Mayor, etc., 7 N. Y. 314; Com. v. Armstrong, 45 N. Y. 234; Haldeman v. Railroad, 50 Pa. St. 425, 436; Coster v. Railroad Co., 23 N. J. Law, 227; Dingley v. City of Boston, 100 Mass. 544.

The legislative power has not generally deemed it essential to require or authorize the taking of any greater interest in the land than an easement terminable by cessation of the use. Hence the well-settled rule that when the public use for which the property was taken, or to which it was dedicated, has become impossible, the freehold reverts to the grantor. But this right of reverter depends upon the question as to whether the original owner was devested of his entire interest by the proceeding, dedication, or grant under which the municipality acquired the property in question.

The charter under which the city of Cleveland was governed at the time of Case's deed (34 Ohio Laws, 271), gave ample power to receive, purchase, and hold real estate for the due exercise of its corporate purposes, and we fail to find anything in the statute law of Ohio which would convert a fee in property acquired by deed for street purposes into a conditional estate or a mere easement. This power of taking land for street purposes by deed or grant is quite distinct from the power of appropriating land in invitum. The observation of Judge White in Gall v. City of Cincinnati, 18 Ohio St. 563, 568, where the title of the city to the market space involved depended upon deeds, that "the title acquired by purchase is to be determined by the character of the conveyance, and is not affected by the character of the estate conferred on the city in case of appropriation," is equally true here. Neither is the title of the city in any degree affected by the character of title and trust created by the Ohio act of March 3, 1831 (29 Ohio Laws, 320, and section 2601, Rev. St. Ohio). That act simply provides what the effect shall be of recording a town map or plat made by persons laying off a town. Under that act the recording of such plat showing streets, commons, alleys, etc., operates as a conveyance in fee to the town or city of the property laid off into streets, etc., to be held "in trust to and for the uses and purposes so set forth and expressed or intended." This act has been construed by the Ohio court as a statutory dedication of streets, commons, etc., shown by such a recorded map or plat, and as conferring no power of alienation discharged of the use thereby indicated, and that when the particular use becomes impossible of execution the property reverts to the dedicator or his representatives.

Board v. Edson, 18 Ohio St. 226; Commissioners v. Young, 8 C. C. A. 27, 59 Fed. 96, 99.

The deed made by Leonard Case is the only source of the city's title, and the title thereby acquired is entirely unaffected by the statute we have cited, or the Ohio cases which construe and apply it. Neither have we to deal with a common-law dedication. That sort of dedication, as we had occasion to observe in Commissioners v. Young, 8 C. C. A. 27, 30, 59 Fed. 99, operates "only by estoppel." "The acquiescence of the owner and use by the public estop him from asserting any right of possession hostile to such use." It is obvious that under such a dedication the public acquire only an easement. "The owner of the fee may resume possession wherever there has been a full and lawful abandonment of the use for which the dedication was made." This is the well-settled rule concerning public roads, streets, etc., when the fee remains in the owner of the land over which the road, street, or alley has been established. Commissioners v. Young, cited above; Village of Fulton v. Mehrenfield, 8 Ohio St. 440; Barclay v. Howell, 6 Pet. 498, 8 L. Ed. 477.

The title of the city of Cleveland depends neither upon a common-law dedication, nor upon a statutory dedication under the act of March 3, 1831, nor upon the effect of any legal proceeding appropriating land for street purposes, but solely and wholly upon the legal effect of the deed of Leonard Case to it. The city, in view of the public interests involved, has consented to a nominal assessment of damages for its interest in Case street; and if Leonard Case has, by his deed, devested himself of every interest in the property, his heirs have no interest to be appropriated by the present proceeding, and no ground to complain because they were not awarded damages. The deed of Leonard Case cannot, in strictness, be regarded as a pure donation. We have no other evidence as to the consideration than that shown by its recitals, and by the ordinance of the city granting to the vendor, in consideration of his conveyance, the right to occupy a portion of the sidewalks upon the four sides of the lot retained by him, and subsequently conveyed to the Cleveland Library Association. His deed recites that the consideration for his conveyance is one dollar, "and divers other considerations received, to my full satisfaction, of the city of Cleveland." The right to occupy five feet of the sidewalk upon Superior, Wood, Rockwell, and Case streets, with pilasters, areas, and balconies, for a block of buildings about to be erected upon that part of his original lot retained by him, was a valuable consideration. If it be conceded that this contract was in excess of the corporate power of the city, as urged by counsel, it would still leave the deed as one made upon a purported valuable consideration, and take it out of the category of a purely voluntary donation. The deed undoubtedly carried the legal title to the city. Apt words for that purpose are used. The

words are, "do give, grant, bargain, sell, and confirm unto the city of Cleveland," not an easement or right of user, but "the following described tract or lot of land." Then follows the description, which concludes with the words, "which land is conveyed to said city as and for a public street of said city." The habendum clause is in these words: "To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said city of Cleveland and its assigns, forever, to its and their own proper use and behoof." This is followed by the usual covenant of seisin and warranty, the latter running to the city and "its assigns." The words concluding the description, "as and for a public street of said city," are the only words which in any way distinguish this conveyance from an ordinary warranty deed to an individual. Do these words, without more, operate to qualify the estate conveyed so that, upon a discontinuance of Case street, the property will revert to the grantor? If so, the plaintiffs in error, as heirs at law of the grantor, have an interest in such possibility of reverter which is of some value, and which cannot be appropriated without compensation. The mere expression of a purpose for which it is intended that the granted premises will be used will not debase a fee into a conditional estate. This rule we had occasion to declare and apply in the case of Commissioners v. Young, 8 C. C. A. 27, 36, 59 Fed. 96, where the authorities are fully considered and cited. The deed construed in that case was a quitclaim deed to the village of Youngstown by the heirs of one who had theretofore dedicated the parcel of land as a "burying ground." The words, "to be under the authority and control of its proper council and municipal authority, in conformity with the act of the legislature of Ohio in that behalf," were held to be words merely indicating the purpose of the grantor as to the use to which the property should be appropriated, and as not making the fee a conditional one. The Ohio act referred to was one which regulated the powers of villages over cemeteries. The declaration of the purpose to which the grantor expected the property to be devoted, and the details of management, read into the deed by the reference to the Ohio act, tended much more strongly to make the deed there construed a conditional fee than the deed here involved. The opinion of this court in that case is therefore controlling in the disposition of the present case. There are in the Case deed no words of re-entry and no words implying a condition other than the words, "as and for a public street." "A deed will not be construed to create an estate on condition unless language is used which, according to the rules of law, ex proprio vigore imports a condition, or the intent of the grantor is otherwise clearly and unequivocally indicated." Rawson v. Inhabitants of School Dist. No. 5, 7 Allen, 125, 127.

The words, "as and for a public street," do not, ex proprio

vigore, import a condition. In Green v. O'Conner, 18 R. I. 56, 25 Atl. 692, it appeared that the owner of land conveyed a strip to the city of Providence. The conveyance was in fee, but recited that "this deed is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose." It was held that the clause did not create a condition subsequent. In Kilpatrick v. City of Baltimore, 81 Md. 179, 31 Atl. 805, the conveyance was of a parcel of land to the city, with an habendum clause as follows: "To have and to hold the parcel of ground above described, * * * unto the mayor and city council of Baltimore aforesaid, and its successors, forever, as and for a street to be kept as a public highway." The land was diverted to another use, and action was brought to recover the property as for a condition broken. The court held that the words were consistent with an intent to repose a confidence in the authorities that they would carry out the purpose of the grantor so long as it was reasonable and practicable, but did not constitute a condition subsequent. In Rawson v. Inhabitants of School Dist. No. 5, cited above, the words, "for a burying ground, forever," in a deed to the town of Uxbridge, were held not to make the estate conditional. In Raley v. Umatilla Co., 15 Or. 172, 13 Pac. 890, a warranty deed to the county, "for the special use, and none other, of educational purposes, and upon which block shall be erected a college or institution of learning," etc., was held to convey an unqualified fee. In Beach v. Haynes, 12 Vt. 15, a conveyance of land in fee to the town of Westford, "for the use of a common," was held to pass an alienable fee; and in State v. Woodward, 23 Vt. 92, a deed to a town, "for the use of the town as a meeting house," was held to pass an unqualified fee. In Taylor v. Binford, 37 Ohio St. 262, it was held that the grantor could not re-enter for condition broken, where his deed was to a township board of education, "its successors and assigns, forever," "for the use of school purposes only," although the property has been sold at public sale to the highest bidder and conveyed by the board. In Watterson v. Ury, 5 Ohio Cir. Ct. R. 347, affirmed by the supreme court upon the opinion of the circuit court, the deed contained a clause, "as a burial ground for the Roman Catholics." It was held that the grantee took a fee-simple estate, and not an estate upon condition. To the same purport are the cases of Curtis v. Board, 43 Kan. 138, 23 Pac. 98; Packard v. Ames, 16 Gray, 327; Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502.

If the deed of Case devested the grantor of every interest, and conveyed an unconditional fee, the title thus vested was unaffected by the subsequent city ordinance. The words, "as and for a public street of said city," are to be regarded as an expression of the grantor that the property shall be constituted and maintained as a public street, so long as it shall be reasonable and practical. The ordinance is the action of

the city carrying out this purpose of the grantor. Such an ordinance was made necessary by the Ohio act of March 18, 1859 (56 Ohio Laws, 57), which provided that no street thereafter dedicated to public use by its owner should be deemed a public street so as to impose responsibility upon the city for its care and maintenance, "unless the same shall be accepted and confirmed by an ordinance specially passed for such purpose." The object of the ordinance is therefore palpable. Its effect was not to qualify the city's title, but to make a public street over and upon property which the city owned in fee. That the title of a city to its streets is property held publici juris for use as streets may be conceded. But if the grantor has parted with all of his title, and the street is lawfully vacated or devoted to some other public use, no right, title, or interest of the grantor is affected, and his heirs have, as such, no interest which is taken and for which compensation may be demanded. The rights of abutters may be affected by devoting a street to other purposes, and they may have such rights as will entitle them to interfere, but the grantor has no such right if, in fact, there is no reverter upon abandonment of use as a street. We cannot hold that the language of this deed so unequivocally imports a right of re-entry upon the discontinuance of this street as to make the title subject to a condition subsequent without violating the cardinal principle of real property, "that conditions subsequent, which defeat an estate, are not to be favored or raised by inference or implication." The judgment is accordingly affirmed.

DAVENPORT & R. I. BRIDGE RY. & TERMINAL CO. *et al.* *v* JOHNSON. SAME *v.* HASS.

(*Supreme Court of Illinois, Dec. 20, 1900.*)

[59 N. E. Rep. 497.]

Town Plat—Erroneous Acknowledgment—Fee in City.*—The plat of a town, having been acknowledged before the clerk of the circuit court, does not convey the fee of the streets to the town, under Act Feb. 27, 1833, "An act providing for recording of town plats"; section 4 providing that it shall be acknowledged before a justice of the supreme court, justice of a circuit court, or a justice of the peace, and section 5 providing that the plat, when acknowledged as required by the act, shall vest the fee of the streets in the town.

Same—Duty of Commissioners to Acknowledge.—Where a town is laid out by county commissioners, they must acknowledge the plat, under Act Feb. 27, 1833, "An act providing for recording of town plats," section 4 providing that "the plat * * * shall be certified by the surveyor and the county commissioners, and every person * * * whose duty it shall be to comply with the foregoing requisitions shall * * * acknowledge the same"; the first three sections requiring certain acts of county commissioners who wish to lay out a town, and section 7 providing that where a town has been heretofore laid out, and a plat thereof

*See *note* to Iron Mountain R. Co. *v.* Bingham, 4 L. R. A. 622; *note* to Moose *v.* Carson, 7 L. R. A. 548.

has not been acknowledged, it shall be the duty of the present county commissioners, or a majority of them, to acknowledge it, under penalty for failure to do so.

Street – Boundary.—A street, with a river as one boundary, extends to the center of the river.

Estoppel—Trespass by Railroad.—One is not estopped to object to trespass by one railroad by reason of having allowed other railroads to do so.

Error to circuit court, Rock Island county; William H. Gest, Judge.

Suits by Walter Johnson and by Frederick Hass against the Davenport & Rock Island Bridge Railway & Terminal Company and another. Decrees for complainants, and defendants bring error. Affirmed.

Joseph L. Haas and Sweeney & Walker, for plaintiffs in error.

J. T. Kenworthy, for defendants in error.

CARTWRIGHT, J. The defendants in error, Walter Johnson and Frederick Hass, filed separate bills in equity in the circuit court of Rock Island county against plaintiffs in error, alleging that complainants were owners of lots fronting on Mississippi street (now called "First Avenue"), in the city of Rock Island, lying between their lots and the Mississippi river on the north; that they were the owners in fee of so much of said street as was situated immediately north of their respective lots to the center thereof, subject only to an easement in the public for the purposes of a street; that the defendants were about to build and maintain a railroad embankment, with railroad tracks, in said street in front of their premises, where they were so vested with the fee, without having obtained, by condemnation or otherwise, any right to appropriate said lands for railroad purposes. The bills were answered with denials of the rights claimed, and the issues were referred to the master in chancery. In each case a stipulation as to the facts was made, and testimony was also taken, and the reports of the master were in favor of complainants. Exceptions were taken by the defendants, which were overruled by the court, and there were decrees for perpetual injunctions against constructing, maintaining, or using any railroad track or tracks on the street in front of complainants' property, unless defendants should obtain the right to do so by grant or condemnation. The cases have been consolidated.

The question to be decided is whether the complainants, as owners of lots fronting on Mississippi street (now First avenue), are the owners of the fee where it is proposed to locate and build the railroad tracks, subject to a public easement in the city of Rock Island for the purposes of a street, or whether the fee in the street is in the city of Rock Island, which has granted the right to so locate and build said railroad tracks. If the complainants are the owners of the fee,

they are entitled to enjoin the defendants from appropriating the street and imposing an additional servitude upon their lands until a grant has been obtained from them or their interest has been condemned and paid for. Bond v. Pennsylvania Co., 171 Ill. 508, 49 N. E. 545. The facts upon which that question turns are as follows:

On March 1, 1833, an act of the general assembly was passed appointing John Dixon and Elijah Charles, of Jo Daviess county, and John B. Gum, of Knox county, commissioners to locate a permanent seat of justice for Rock Island county, to be called Stephenson, in commemoration of Col. Benjamin Stephenson. Laws 1833, p. 17. It appears that these commissioners did not make the location, and another act was passed, in force February 12, 1835, by which William Bennett, of Jo Daviess county, Peter Butler, of Warren county, and John G. Sanburn, of Knox county, were appointed commissioners to locate such permanent seat of justice for Rock Island county, and the county seat, when selected and located, was to be called Stephenson. By section 3 it was provided that when said commissioners, or a majority of them, should have agreed upon the place, they should make a report to the county commissioners, and the commissioners, at their next term, should cause the same to be entered upon the records of said court, and the place so selected should be the permanent seat of justice. If the location was on public land, the county commissioners were authorized to proceed to purchase it for the use of the county. Laws 1835, p. 159. The commissioners so appointed located the seat of justice for said county on public land on the N. W. fractional ¼ of section 35, in township 18 N., range 2 W., of the fourth principal meridian, and on July 8, 1835, made report thereof to the county commissioners, who entered and purchased said tract of land from the United States. A patent was afterwards issued, dated May 20, 1841, reciting payment by George Davenport, John W. Spencer, and John Vanata, county commissioners of Rock Island county, and conveying said tract to said county. The tract contained 61.95 acres according to government survey, and its northern boundary was the Mississippi river. The land conveyed to the county of Rock Island therefore extended to the center thread of said river. The county commissioners, under authority of "An act providing for the recording of town plats," in force February 27, 1833, laid out said town of Stephenson on said tract of land, and on July 10, 1835, the county surveyor presented a map or plat of said town to the county commissioners' court, properly certified, as required by the fourth section of said act, and the map was also certified by the county commissioners. On the same day the surveyor and county commissioners also acknowledged the plat before Joseph Conway, clerk of the circuit court for Rock Island county. The acknowledgment was not before a justice of the supreme

court, a justice of the circuit court, or a justice of the peace of said county (the officers named in the act, and authorized to take the acknowledgment), and therefore such acknowledgment was insufficient. Village of Vermont v. Miller, 161 Ill. 210, 43 N. E. 975. If it was necessary to acknowledge the plat, it could not operate as a statutory dedication, but would only grant an easement instead of a fee in any of the streets marked upon it. The plat showed a street marked "Mississippi Street," on the north of the town, extending along the north tier of blocks and next to the Mississippi river, with four wavy, parallel lines on the north indicating the river, and with the name "Mississippi River" written there. The certificate stated with reference to streets as follows: "Each street 80 feet, except Water or Front street, the northeast end of town, is 110 feet wide, at or near the middle of the town or widest part of street 260 feet, at the southwest end of the town 90 feet wide." This street, called Water or Front street, is the one also clled Mississippi street, and is now First avenue. Complainants' lots front on the south side of that street, and on the opposite side is the Mississippi river. In the stipulated facts it was agreed that if, in law, the center of the Mississippi river is the north line of Mississippi street or First avenue, the proposed construction of defendants' railroad is on the south half of said street.

The question of law whether the fee in the street has passed from the county of Rock Island to the city of Rock Island, of which the town of Stephenson is a part, depends upon whether the plat of the town was made in accordance with the act of 1833. Under that act the plat would operate as a conveyance if made in compliance with its terms, but it would so operate only in case all the conditions of the act were complied with. Section 5 of the act provided as follows: "The plat or map, when made out and certified, acknowledged and recorded, as required by this act, every donation or grant to the public, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted as such on said plat or map, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes as a general warranty against such donor or donors, their heirs and representatives to the said donee or donees, grantee or grantees, for his, her, or their use, for the uses and purposes therein named, expressed or intended, and no other use or purpose whatever. And the land intended to be for streets, alleys, ways, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust to, and for the uses and purposes set forth, and expressed or intended." If there was a failure to observe the requirements of the statute, and the plat operated as a common-law dedication, a conveyance of complainants' lots bounded by the street would

operate as a conveyance of the fee to the center of such boundary. In such case, they would own to the center of the street, burdened with the easement. Whether it was a statutory or common-law dedication, the dedication was accepted, and the city council passed an ordinance granting to the defendants the right to construct, maintain, and use their tracks which complainants asked to have enjoined.

It will be noted that section 5, which provides that the plat shall operate as a conveyance of the fee in the street to the public, includes the acknowledgment of the plat as required by the act as one of the conditions to such operation. The first three sections require county commissioners who wish to lay out a town to cause the same to be surveyed, and a plat or map thereof made, with lots numbered, corner stones planted, and in other respects as required by those sections, and then section 4 provides as follows: "The plat or map, after having been completed, shall be certified by the surveyor and the county commissioners, and every person or persons whose duty it may be to comply with the foregoing requisitions, shall, at or before the time of offering such plat or map for record, acknowledge the same before a justice of the supreme court, justice of a circuit court, or a justice of the peace in the county where the land lies, a certificate of such acknowledgment shall be by the officer taking the same endorsed on the plat or map; which certificate of the survey and acknowledgment shall also be recorded and form a part of the record." The county commissioners are persons whose duty it is made, in the plainest and most unmistakable terms, to comply with the requisitions going before in the previous sections, and they are therefore required by section 4 to acknowledge the plat. In this case the commissioners understood that they were bound to acknowledge the plat, as appears from their doing so; but, instead of doing it before one of the judicial officers named in the act, they made their acknowledgment before the clerk of the circuit court, who was not authorized to take it. In Town of Lake View v. Lebahn, 120 Ill. 92, 9 N. E. 269, a plat had been made by private owners, and it was claimed that the county commissioners were required to certify to it. The court, passing on that question, said (page 99, 120 Ill., and page 271, 9 N. E.): "We do not understand the statute to so require. It provides for the case of laying out towns or subdivisions by county commissioners or other persons; and, as we read the statute, where county commissioners cause the plat to be made they are to acknowledge it, and where other persons cause the plat to be made they only are required to acknowledge it, and that the plat need only to be certified by the county surveyor."

The further provisions of the act of 1833 show that the legislature understood that county commissioners must acknowledge the plat. Section 7 provides as follows: "Where any town, addition, or subdivision of out-lots has been heretofore

laid out, and lots sold in this state, either by county, agents, commissioners, or other persons, and a plat or map of the same has not been acknowledged and recorded as required by the act, entitled 'An act to provide for the recording of town plats,' approved January 4, 1825, and the amendment to said act, passed at a subsequent session, it shall be the duty, and it is hereby required of the present county commissioners, or a majority of them, in such county, or other person or persons, proprietors, who have laid out the same, or his, her, or their legal representatives, to have the same fairly, fully, and clearly made out, certified, acknowledged, and recorded in the proper county, in the form and manner required by this act, * * * and if any county commissioner or commissioners, or other person or persons, whose duty it is to comply with the requisitions in this section named, shall neglect or refuse so to do, he or they shall forfeit and pay the sum of $100 for each and every month he or they shall delay a compliance." This provision required the then existing county commissioners, or a majority of them, to have such a plat acknowledged as required by the act, where it had not already been done. This provision was re-enacted as section 23, div. 1, c. 25, Rev. St. 1845, and applied to towns laid out under this act of 1833. This regulation establishes the legislative understanding that an acknowledgment was required. Severe penalties were imposed upon any county commissioner or commissioners who should delay or refuse to comply with the requisitions of that section.

It is contended, however, in argument, that the county commissioners were not meant by the act of 1833, because they constituted a court, and it could not have been intended that a court should acknowledge its acts. It will be seen that the acknowledgment of the plat was required to be by the persons who were county commissioners, and that the penalties imposed for a failure of duty were against the individuals. In the curative provision of section 7 and the subsequent revision of 1845, the county commissioners, or a majority of them, were required to acknowledge the plat, and section 8 of the act of 1833 imposed a penalty of $100 against any county commissioner who caused a town to be platted in any other manner than that which was prescribed in the act. It would, of course, be preposterous to suppose that a court, with its clerk and sheriff, should adjourn to the office of a justice of the peace or other judicial officer named in the act, and hold a special session there for the purpose of acknowledging a plat as a judicial act of the court. But the act is not of that nature. Section 4 of the schedule to the constitution of 1818 provided: "There shall be elected, in each county, three county commissioners for the purpose of transacting all county business, whose time of service, power and duties shall be regulated and defined by law." These officers were named county commissioners, and they were

elected to attend to business affairs. By the statutes they were organized into a court, but their duties were ministerial and administrative as well as judicial. In Vermilion Co. v. Knight, 1 Scam. 97, the court said (page 100): "The constitution, indeed, expressly names them commissioners, and through all the legislative acts, then spoken of, the term 'county commissioner' is used as frequently as 'county commissioners' court.' They are known by the law as a public corporation, created for the purpose of superintending the business of the county in relation to its fiscal and local concerns." The law authorized them to enter into contracts for the county, and to manage its business affairs, and the act in question here was ministerial and administrative in its nature, and not in any sense judicial. It was a duty imposed upon the commissioners, and for a failure to observe it each individual was to be visited with a penalty.

It is also argued that the county commissioners were not required to acknowledge the plat, under the rule, in cases where the canal commissioners platted lands belonging to the state. The rule in such cases was determined in City of Chicago v. Rumsey, 87 Ill. 348, and it was held that the act for the construction of the Illinois and Michigan Canal, which made it the duty of the commissioners to lay out town sites into town lots, did not require an acknowledgment. The plat made in that case was in conformity with all the provisions of the statute governing the canal commissioners in disposing of the lands of the state, but it was said that, if the land had belonged to any other party than the state, the point that there was no acknowledgment would have been well taken; that the statute of 1833 included almost every other authority or person but the state by which a town could be laid out, but that it did not include the sovereign. In Matthiesen & Hegeler Zinc Co. v. City of Lasalle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81, the same rule was stated, and another line of reasoning was pursued to the same conclusion. It was said that, when the statute providing for laying out towns by the canal commissioners was passed, the statute of 1833, which did not name the state, was in force; that the act concerning the canal empowered the commissioners to lay out town sites, and that the law also provided that all deeds, titles, papers, agreements, and contracts of the canal commissioners affecting title of real estate should be admitted to record without proof or acknowledgment of the execution thereof. These cases were decided upon the ground that the act of 1833 did not include the state as the sovereign, and that it had provided in another act for laying out towns on its land. The acknowledgment of the plat not being in conformity with the requirements of the statute, the fee to the street has not vested in the city of Rock Island, but the north half is in the county of Rock Island, and the south half in the abutting lot owners.

The next question is where the center line of the street is

located to which complainants' ownership extends. The title of the county of Rock Island to the tract on which the town was laid out extended to the center of the Mississippi river, but defendants insist that the street extends only to the south side of the river. The same question arose in Village of Brooklyn v. Smith, 104 Ill. 429. The appellee, Smith, filed his bill for an injunction against the village of Brooklyn to prevent interference with his cutting and gathering a crop of ice in the Mississippi river west of Water street of said village. The village was laid out on the east bank of said river, and Water street ran parallel with the river, and extended to the water's edge. The plat of the village had the force of an express grant to convey the fee to the village. Water street was designated on the plat as 80 feet wide, but extensive accretions formed on the river front, comprising an area of 100 acres or more. The question to be decided was how far Water street extended westward, and the court sustained the claim of the village that the street extended to the middle of the river. On the plat the western line of Water street along the river was an irregular, wavy line, the same as in this case, depending on the meanderings of the river, and indicating the river as a boundary. The court said (page 438): "Grants of land bounded on rivers or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river. Braxon v. Bressler, 64 Ill. 488, and authorities there cited. The premises in question, then, were in Water street, of the village of Brooklyn." It was held that the case presented was that of an intruder upon the public street of a village cutting and removing ice from the street. The court said that the stream was a public highway, and in contact with it the other easement of a street. Under that decision there is no question but this street extended to the center of the Mississippi river.

It is, however, urged with the utmost confidence that the decision in that case was overruled in Sanitary Dist. v. Adam, 179 Ill. 406, 53 N. E. 743. We do not understand it in that way. In the later case the appellees owned lots 1 and 2, in block 57, on the east bank of the Des Plaines river, and had title to the center of the stream. On the west side of said river, opposite the said lots, they also owned lots 1 and 4, in block 56. School street bordered on the river on the west bank, between block 56 and the river. It was contended that as appellees owned lots in block 57 on the east side, extending to the center of the river, and School street extended eastward to said center of the river, the lots on the east side abutted on the east side of School street, in the middle of the river. It was said that the argument was more fanciful than real; that under the doctrine laid down in Village of Brooklyn v. Smith, supra, the street extended to the center of the river,

but that the expression "of adjoining lot owners" applied only to owners of lots abutting on a street to which they could have access from their lots, and did not refer to lots on the opposite side of the river. The decision recognizes the doctrine that the street in this case extends to the center of the river, and the point decided there was that one owning a lot on the opposite shore was not an abutting lot owner, where there was an insuperable obstacle to his access to the street from his lot.

It is contended that complainants are estopped by their conduct to claim any rights in the street against defendants. They stood by and permitted other railroads to trespass on their rights, but we find nothing in their conduct that could operate as an estoppel as to the defendants. When the defendants undertook to enter upon the premises in front of complainants' lots, the latter obtained injunctions. The fact that other companies had entered upon and occupied the land, and complainants did not object, furnishes no ground for claiming that they abandoned the constitutional guaranties as against defendants. When a new servitude is threatened by a new party, we see no reason why they may not object until compensation is made, or why they should be barred from seeking the protection of the court. The decrees are affirmed. Decrees affirmed.

GILBERT *et al.* *v.* CITY OF BERLIN *et al.*

(Supreme Court of New Hampshire, Coos, July 27, 1900.)

[48 Atl. Rep. 279.]

Right of Municipality to Acquire and Hold Realty—Collateral Attack.*—Pub. St. c. 40, § 3, provides that a city may purchase and hold real and personal property for the public use of its inhabitants. *Held*, that where the records of a city showed that the realty in controversy was purchased for a public use, the question of the city's right to hold the property cannot be raised in a collateral proceeding to subject the property to a mechanic's lien, but only in a direct action by the state.

Levy of Execution—Appointment of Appraisers—Notice.—Pub. St. c. 233, § 2, provides that the officers levying an execution shall cause appraisers to be appointed, and that, if the debtor on due notice neglects to appoint an appraiser, the officer shall appoint one for him. Plaintiffs obtained a judgment against specific property, which, to their knowledge, had been conveyed by the judgment debtors to defendants prior to plaintiffs' lien, and issued an execution on the judgment while the property was in possession of defendants as owners. *Held*, that plaintiffs' failure to notify defendants to appoint an appraiser was fatal to the levy of the execution.

Action by Augustine N. Gilbert and others against the city of Berlin and others for the partition of real property. Petition dismissed.

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*See *note* to Hanson *v.* Little Sisters of the Poor of Baltimore, 32 L. R. A. 293.

Gilbert *v.* City of Berlin

Petition for partition. Facts agreed. The Berlin Shoe Factory was organized as a corporation for the purpose of building a factory in Berlin, in this county. January 15, 1896, the corporation conveyed its land and buildings, which cost $40,000, to the town of Berlin for $15,000. At the date of the conveyance the factory was occupied by Chick Bros., who have ever since held the premises under a lease from the corporation. At a town meeting held December 12, 1895, it was voted "that the town purchase, acquire, and hold by conveyance, mortgage, or otherwise, an interest in the real estate owned or occupied by the Berlin Shoe Factory, * * * and that the same be held for the public use of the inhabitants of said town; and that the selectmen be, and hereby are, authorized to receive any such conveyance, mortgage, or deed, or to make any contract in relation thereto for the purpose of acquiring an interest in the real estate above described." All the plaintiffs were present at the meeting, and voted in favor of the resolution. The plaintiff Gilbert was one of the selectmen of the town, and acted as such in negotiating the purchase of the property. April 6, 1896, the plaintiffs began suits against the corporation by attaching the property conveyed to the town, in order to preserve their liens for labor performed and materials furnished in erecting the factory, and recovered judgments as for liens for the amount of their respective claims, on which judgments levies were made upon undivided fractional parts of the property. The plaintiffs acquired good titles to such individual parts unless their levies were invalid because the officer in making them gave notice to the shoe factory to appoint appraisers, instead of giving notice to the town or city of Berlin, which had no opportunity to appoint them. The plaintiffs knew of the conveyance of the property to the town when it was made. The town had notice of the existence of the lien claims when it purchased the property, and took a bond of indemnity against loss by reason of them.

Enoch Foster, Crawford D. Hening, and William H. Paine, for plaintiffs.

Chamberlin & Rich, for defendants.

BLODGETT, C. J. The plaintiffs' contention that the town of Berlin could not lawfully obtain title to the premises in question by purchase, and that, consequently, they still remain in law the property of the grantors, even if well founded, is not germane to the present inquiry. The general doctrine is that, if a municipal corporation exceeds its power in the purchase of lands, the courts cannot inquire into the question in a collateral way, or at the instance of an individual, but it can only be done at the instance of the state. Dill. Mun. Corp. (3d Ed.) § 574, and cases cited; Com. v. Wilder, 127 Mass. 1, 6, 7. But, however this may be, towns in this state being expressly empowered to purchase and hold real and personal estate for the public uses of the inhabitants (Pub.

St. c. 40, § 3), and the records of Berlin showing that the purchase of the premises in controversy was for such a use, the question of its validity will not and cannot be adjudicated in this collateral proceeding; for, if there was such a misuser of the statutory power by the town as to render the title to the property so acquired subject to impeachment by the plaintiffs, all of whom it is found voted for its purchase, it is entirely plain that it cannot be done at their instance at this late day in any form of proceeding. Chamberlain v. Lyndeborough, 64 N. H. 563–565, 14 Atl. 865, and authorities cited.

The title set up by the plaintiffs in their petition cannot be sustained. The executions on which their levies were made were issued upon judgments in rem against the specific property levied upon, which was then in the occupation of the defendants as owners, and which had been conveyed to them by the judgment debtors long prior to the liens, in good faith, and for a valuable consideration, as the plaintiffs well knew. Under these circumstances we are constrained to hold that the defendants must be regarded as "the debtor," within the true intent and meaning of the statute relating to levy by set-off (Pub. St. c. 233, § 2; Fellows v. Hoyt, 69 N. H. 179, 180, 44 Atl. 929, and cases cited), and that, consequently, the levies were fatally defective because of the defendants' want of notice to appoint appraisers. In view of this conclusion, there is no occasion to consider whether section 33, c. 233, Pub. St. (giving to the person having the estate of the debtor his rights, privileges, and remedies as to all persons having notice), has any application to levies other than those upon equities of redemption. Petition dismissed. All concurred.

PERKINSON *v.* MEREDITH *et al.*

(Supreme Court of Missouri, Division No. 1, Nov. 12, 1900.)

[59 S. W. Rep. 1099.]

Special Tax Lien—Foreclosure—Parties—Due Process—Title Conveyed.*—Plaintiff in ejectment purchased land at a sale on special execution issued on a judgment rendered in his favor in a suit on special tax bill, pursuant to the charter of St. Louis, art. 6, § 25, providing that a special tax bill shall become a lien on the property charged therewith, and may be collected of the owner of the land. The record owner of the land was dead, and at the time of her death was a non-resident, of which fact plaintiff was ignorant, and publication was had against such record owner and her grantor, but her heirs were not made parties to the suit. *Held*, that plaintiff did not acquire title at such sale, since as the record owner was dead, and her heirs were not parties, the owners of the land were not before the court, and their title was not devested thereby.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Ejectment by James E. Perkinson against Julia E. Meredith

*See *notes*, 2 L. R. A. 773.

and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

T. A. Post, for appellant.

A. C. Stewart and Isaac H. Orr, for respondents.

ROBINSON, J. This is an action in ejectment instituted in the circuit court of St. Louis to secure the possession of certain real estate described in the petition. A trial was had by the court, a jury having been waived, which resulted in a finding and judgment for the defendants, and plaintiff appealed. The petition is in the usual form in such case, the answer a general denial. On July 7, 1883, William Collins, who is the common source of title, conveyed the lot in question to J. Oliver, who is described in the deed as being "of the city of Chicago and state of Illinois." Afterwards, on July 11, 1890, John Oliver, described in the deed as being "an unmarried man, of St. Louis, in the state of Missouri," gave a deed of trust on said lot to H. C. Sanford, trustee for Isaac Drexel, of New York; and on the same day John Oliver and S. H. McMillan conveyed said lot, together with other property, by warranty deed to Olive M. Hilton. This deed, however, was not recorded until the 7th day of May, 1894. On July 23, 1894, plaintiff commenced suit in the circuit court of the city of St. Louis against J. Oliver on a special tax bill issued pursuant to an ordinance of the city of St. Louis passed for the purpose of improving Lee avenue in front of the lot in question. In November following an amended petition was filed, making Olive M. Hilton a party defendant. Thereupon publication was made as to both defendants, on the theory, doubtless, that they were nonresidents of the state. On June 17, 1895, judgment by default was rendered against J. Oliver and Olive M. Hilton. This judgment recites that "the court, being now fully advised, doth find that the defendants are indebted to the plaintiff in the sum of fifty-four and eighty-three one hundreths dollars ($54.83), by reason of a special tax bill dated December 20, 1892, and numbered 7,838, herewith filed, and upon which this action is founded, and the court doth further find the same to be a lien upon the real estate described in the amended petition. * * * Whereupon it is now by the court considered that plaintiff do recover the indebtedness aforesaid, found as aforesaid, to wit, * * * and that execution issue therefor, the same to be levied of real estate charged with the lien thereof, and heretofore described." Afterwards, on the 22d day of July, 1895, a sheriff's sale was had under special execution issued on said judgment, and plaintiff became the purchaser, and received a sheriff's deed therefor. On October 9, 1895, the trustee in said deed of trust conveyed said lot, by trustee's deed in the usual form, to Elizabeth Werremeyer, in pursuance of a foreclosure sale under the deed of trust. Afterwards, in December, 1896, Elizabeth Werremeyer conveyed the lot in question to Julia Meredith, the defendant herein. The evidence shows that J. Oliver,

described in the deed from William Collins as being "of the city of Chicago and the state of Illinois," who executed the deed of trust on the lot in question to H. C. Sanford, trustee of Isaac Drexel, and John Oliver, named in the warranty deed above mentioned to Olive M. Hilton, was one and the same person. It further appears that Olive M. Hilton was dead at the time the tax suit was begun, and that at the time of her death she was a resident of the state of Colorado. The record also shows that at the time the tax suit was commenced, and at the date of plaintiff's purchase at sheriff's sale thereunder, he had no notice or knowledge whatever that J. Oliver and John Oliver was one and the same person, or that Olive M. Hilton was dead.

The plaintiff claims title by purchase at execution sale under sheriff's deed, in pursuance of a sale on special execution issued on the judgment rendered in the suit on special tax bill against J. Oliver and Olive M. Hilton. It is contended by counsel for defendants that no title was acquired by plaintiff's purchase at the sheriff's sale under the judgment in the tax suit, because at the time the suit was begun Olive M. Hilton was dead, and the proper parties defendant were not before the court. On the other hand, the contention of plaintiff, as stated by his counsel, is that "even if the evidence was sufficient to warrant the court in finding that the alleged conveyance to Olive M. Hilton was sufficient to pass title to her to the property in question, and sufficient to warrant the court in finding that she was dead at the time suit was brought against J. Oliver and Olive M. Hilton, nevertheless, inasmuch as the evidence also showed that the title to the property in controversy then stood of record in the name of Olive M. Hilton, and inasmuch as no proof was adduced showing notice to plaintiff of her death at the time when said suit was brought, the court erred in holding that said notice to Olive M. Hilton was not sufficient to subject any such right, title, and interest as may have passed by said deed to said Olive M. Hilton to the lien of the tax bill declared upon in said suit, and to the judgment and execution thereon, to plaintiff's purchase thereunder." The point for decision, therefore, is whether the tax suit instituted against Olive M. Hilton, after her death, authorized a judgment and sale thereunder, so as to vest title to the lot in controversy in plaintiff, without being in the heirs of Mrs. Hilton. Olive M. Hilton having, by successive conveyances, all of which were duly recorded prior to the commencement of the tax suit, acquired the interest of J. Oliver in the lot in question, it is not perceived how the order of publication against said Oliver could affect the title thus acquired by her, especially where, as here, it was shown that J. Oliver and John Oliver was one and the same person. Neither can it be said that the order of publication bringing in Olive M. Hilton was effectual to enforce the lien of the special tax bill and pass the title to plaintiff.

But it is urged by appellant that inasmuch as the tax suit was not for the purpose of securing a personal judgment against Olive M. Hilton, being against the property, and not against the owner, "it is not necessary, for the purpose of the special tax bill suit under the St. Louis charter, that there should be any actual party in court." This position, in our opinion, is untenable. In Vance v. Corrigan, 78 Mo. 94, an action between the holder of a tax deed and the holder of a prior unrecorded deed to the same lot, both parties claimed title from the same grantor. In speaking of the nature of the action in that case, the court says: "The proceeding is really against the land, although a personal defendant is necessary to the validity of the proceeding, but no personal judgment can be rendered in the suit, and it is sufficient to proceed against the record title when the owner is unknown." That case, however, is not authority for the position that suit may be brought on a special tax bill against a dead man because the title of record happens to stand in him. At his death he ceased to be the owner, and the title passes to his heirs or devisees. In Gitchell v. Kreidler, 84 Mo. 472, it was said by this court: "While the judgment is against the property, and not personal, still the tax is assessed against the owner, if known. The law looks to him for payment of the tax. The suit to enforce the lien is the last step contemplated by the statute, and to this suit he is a necessary party. Such a proceeding cannot be said to be strictly in rem." The same view is expressed in Blevins v. Smith, 104 Mo. 590, 16 S. W. 214, 13 L. R. A. 443. By section 25 of article 6 of the scheme and charter of the city of St. Louis, it is provided that the special tax bill "shall become a lien on the property charged therewith, and may be collected of the owner of the land in the name of the contractor, as any other claim in any court of competent jurisdiction. * * * This provision simply contemplates a suit to enforce the lien of the special tax bill against the record owner, in the absence of notice to the contrary. How can it be said, then, that the commencement of this suit against Olive M. Hilton after her death could affect the title to her heirs, who were not made parties to that suit? At her death the title passed to her heirs and devisees, and she ceased to be the owner. It follows, therefore, as a natural sequence, that the "owner of the land" was not before the court to show cause why the lien of the special tax bill should not be enforced, and for that reason the proceedings were insufficient to affect the interest now claimed by the plaintiff. In order to devest the land owner's title, he must be made a party to the proceedings. Referring to the charter of the city of St. Louis, under which the tax suit was brought, we find that the lien of the special tax bill is only given against the land, and that the proceeding to enforce the lien only affects the right of the parties made defendants therein. Manifestly, then, in any proceeding to enforce the lien of the

special tax bill, the owner is a necessary party, and such has been the uniform holding of this court. The precise question came before this court in Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 892. In that case suit was begun on special tax bill against R. L. Sullivan, three years after his death, followed by publication, default, and judgment. After judgment, and before the sale, knowledge of the death of Sullivan, who was the owner of record, was brought home to plaintiff. Thereupon the judgment was set aside, and an amended petition filed, making Sullivan's heirs alone defendants. On that state of facts, Gantt, P. J., speaking for the court, says: "We have no hesitancy in holding that, in our opinion, it was never intended that a proceeding to enforce a lien for street improvements should be a proceeding strictly in rem. On the contrary, the unmistakable purpose of the legislature was that the right or title of no owner should be affected or bound unless he was made a party, and notified accordingly." Counsel for plaintiff contends, however, that the Sullivan Case is not in point here, because the charter of Kansas City, under which that suit was brought, "not only required that suit should be brought against the owner of the property, but that only the right, title, interest, and estate of the parties made defendants in any suits shall be affected or bound thereby." The provision of the Kansas City charter to which our attention is called came somewhat under review in Stafford v. Fizer, 82 Mo. 393. Commissioner Martin, in speaking of the charter provisions requiring suits to enforce special tax bills for street improvements to be brought against the owner of the property, says: "This express reservation of their rights to parties interested in the land, who had been omitted in the proceeding to devest their interest, is only declaratory of the law which has always been recognized in this state as governing the practice of enforcing liens against realty. * * * In the absence of the express reservation contained in the act, the conclusion reached by the court in the cases cited would have been the same. It could not have been otherwise without approving the repulsive practice of devesting a person of his rights and estates in land by virtue of a proceeding which omits both actual and constructive notice to him of its existence and progress."

No essential difference is observed between the charter of the city of St. Louis, under which this proceeding was instituted, and the provisions of the Kansas City charter construed by this court in the Sullivan Case. The former, like the latter, required suit to enforce the tax lien to be brought against the "owner of the land," and before the rights of any person to the land can be affected they must be made parties to the proceeding. This has been the uniform ruling of this court in proceedings for the enforcement of special tax bills for street improvements. The proper parties not having been

made defendants, no title was acquired by the sheriff's deed under which plaintiff claims.

In view of this conclusion, we do not deem it necessary to discuss the other proposition urged in plaintiff's brief. Many authorites have been cited by counsel for appellant which we do not consider applicable to the peculiar facts of the case, and for that reason have not referred to or commented upon them. The judgment of the circuit court will be affirmed. All concur.

MAYBIN *v.* CITY OF BILOXI.

(*Supreme Court of Mississippi, April 30, 1900.*)

[28 So. Rep. 566.]

Street Paving*—Taxation—Municipal Powers.—A city may tax all the property within its limits to pave only for a short distance three or four of its streets in the business portion of the city with vitrified brick, though other streets are not so paved.

Municipal Bonds—Validity—Effect of Submitting Two Propositions at One Election—Injunction.†—The fact that at the election at which a proposition for the issuance of city bonds for paving the streets was voted on a proposition for the issuance of bonds for the building of a bridge was also voted on, could not be held to affect the validity of the bonds in the absence of proof on the subject; and an injunction will not be granted to restrain the levy of a tax to pay the same.

Appeal from chancery court, Harrison county; Nathan C. Hill, Chancellor.

"To be officially reported."

Action by W. H. Maybin against the city of Biloxi. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. H. Maybin, in pro. per.

W. A. White, for appellee.

TERRAL, J. Maybin, a taxpayer of the city of Biloxi, sued out an injunction against the collection of any taxes to pay certain bonds issued by the city. The taxes are claimed to be illegal on two grounds: (1) Because at the election when the proposition for the issuance of the bonds was voted on and carried a proposition for the issuance of bonds for the building of a bridge across the Back Bay of Biloxi was also voted on; (2) because a tax is laid upon all property in the city to pave only for a short distance three or four streets of the city. It appears to us that the public authority of the city of Biloxi has power to levy a tax upon all the taxable property of the city to pave the streets of the city, or any part of them, and we see nothing unjust in the exercise of the power in the present instance. It seems to us reasonable that the paving of the streets in the heart of the business portion of the city with vitrified brick should be a charge upon the common

*See *note* to Thomason *v.* Carroll, *ante*, p. 81.

†See *note* to Johnson *v.* City of New Orleans, 5 Mun. Corp. Cas. 552.

treasury, though the streets are not so paved. It inures to the convenience and advantage of all citizens alike, and should be a common charge to all.

2. The facts that at the election at which a proposition for the issuance of bonds for paving the streets was voted on a proposition for the issuance of bonds for the building of a bridge over the Back Bay of Biloxi was also voted on, does not, in our opinion, render the election void, or affect the validity of the bonds. The submission of two propositions for the issuance of bonds in both cases at one election was a matter of convenience and advantage of the electors, which does not, in our view, affect the bonds with any infirmity whatever. We can imagine no error in the proceeding, and we can presume no bad motive without adequate proof of such presumption. Affirmed.

LAMB v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts, Oct. 19, 1900.)

[58 N. E. Rep. 474.]

Defective Sidewalk—Personal Injuries*—Question for Jury.—The alleged defect in a sidewalk was a Hyatt light bulkhead, consisting of two flat doors, shutting together in the center, and opening upward and outward, the two together being about four and one-half feet square. There were four hinges, and the hinges projected from one and one-half inches to one and eleven-sixteenths inches above the level of the sidewalk, which was fifteen and one-half feet wide, and but for such alleged defect, smooth, safe, and convenient for travel. Plaintiff's injury resulted from a fall caused by her catching her foot against the corner of the main part of the bulkhead and hinge. *Held*, that whether the bulkhead was a defect in the sidewalk was a question for the jury.

Contributory Negligence†—Question for the Jury.‡—In such action, the question of plaintiff's due care was rightly submitted to the jury, although it was broad daylight, and there was nothing to distract her attention.

Appeal from superior court, Worcester county.

Action by Margaret Lamb against the city of Worcester. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Webster Thayer and Hollis W. Cobb, for plaintiff.

Arthur P. Rugg and Ernest I. Morgan, for defendant.

MORTON, J. This is an action to recover for personal injuries sustained by the plaintiff by reason of an alleged defect in the sidewalk along which she was walking at the time of the accident, in Front street, in Worcester. The sidewalk was 15½ feet wide at the place of the accident. Ten feet of the sidewalk from the street edge consisted of

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*See *notes*, 1 Mun. Corp. Cas. 58, 474, 489; 3 Mun. Corp. Cas. 32; 4 Mun. Corp. Cas. 123; 5 Mun. Corp. Cas. 146, 566.

†See *notes*, 2 Mun. Corp. Cas. 27; 4 Mun. Corp. Cas. 648; 5 Mun. Corp. Cas. 278, 568.

‡See *note*, 4 Mun. Corp. Cas. 651.

granite slabs. The remaining 5½ feet "consisted of what is known as 'Hyatt Light Construction,' being an iron frame, with circular glass insertions to give light to the basement under the sidewalk." The alleged defect was in this Hyatt light construction, and was a Hyatt light bulkhead, which consisted of two flat doors, shutting together in the center, and opening upward and outward, and being together about 4½ feet square. There were four hinges to these doors. The hinges projected from 1½ inches to 1 11-16 inches above the level of the sidewalk. The doors were even and level on top, and were from 1 1-8 to 1¼ inches above the other level of the sidewalk, and were smooth and rounded at the edges, "except that there was a right angle made between the hinge and the main part of the bulkhead, extending upward from the level of the sidewalk, the height at the point where the plaintiff caught her foot being 1½ inches." The rest of the sidewalk, "except as affected by the bulkhead, was smooth and safe, and convenient for travel."

There was evidence tending to show that the accident happened at about 11 o'clock in the forenoon of a bright sunshiny day in December, and that the plaintiff was walking along with a companion, without anything to distract her attention, when she "caught her foot against the corner of the main part of the bulkhead and hinge and fell," and received the injuries complained of. The defendant contends that the bulkhead did not constitute a defect, and that the plaintiff was not in the exercise of due care. Instructions to that effect were requested by it, and were refused, and the defendant excepted. There was a verdict for the plaintiff. Whether projections of the character described, from an otherwise smooth and level sidewalk, constitute defects in the sidewalk which the defendant, in the exercise of reasonable care, should have remedied, seems to us to have been properly submitted to the jury. In view of recent decisions, we do not see how it could have been ruled as matter of law that they did not constitute defects. Redford v. City of Woburn (Mass.) 57 N. E. 1008, and cases cited. The defendant relies upon Raymond v. City of Lowell, 6 Cush. 524. But in that case the alleged defect consisted of a sewer grate resting against the edge of the curbstone of a sidewalk, and projecting an inch or two above it, and it was held that a person who chose to cross the street at that point, and tripped over the grate, could not recover. Dowd v. Inhabitants of Chicopee, 116 Mass. 93, 95. But in this case the defect was in a smooth and otherwise level sidewalk at a place where the plaintiff had a clear right to pass. Moreover, though Raymond v. City of Lowell has been frequently cited and recently cited (see Newton v. City of Worcester, 174 Mass 181, 188, 54 N. E. 521), it has also been questioned (George v. City of Haverhill, 110 Mass. 506, 511; Marvin v. City of New Bedford, 158 Mass. 464, 467, 468, 33 N. E. 605).

We also think that the question of plaintiff's due care was

rightly submitted to the jury. Even in the absence of anything to distract her attention, she was not required to keep it entirely on the sidewalk in front of her as she walked along, and to observe where each footstep was taken. She had a right to rely somewhat on the smooth and level character of the sidewalk generally, and on its being free from dangerous defects. The extent to which she could properly do so, under the circumstances, was eminently a question for the jury. Redford v. City of Woburn, supra. Exceptions overruled.

NEAL *v.* TOWN OF MARION.

(*Supreme Court of North Carolina, April 24, 1900.*)

[35 S. E. Rep. 812.]

Presentment of Demand before Bringing Action*—Not Applicable to Claims Arising Ex Delicto.—Section 757 of the Code of North Carolina, providing in substance, that a demand of payment shall be a condition precedent to a right of action against a municipal corporation, does not apply to actions *ex delicto*.

Abandoned Sidewalk—Personal Injuries†—Contributory Negligence.‡—Where a municipal corporation makes and keeps in repair a good sidewalk on one side of a street, and leaves on the other an abandoned and neglected walk, and these facts are known to a person who chooses to walk along the abandoned sidewalk in the nighttime, and who is injured by reason of a defect in such walk, such person is guilty of contributory negligence barring recovery for his injuries.

Appeal from superior court, McDowell county; Shaw, Judge.

Action by Lizzie C. Neal against the town of Marion and another. From a judgment in favor of plaintiff, defendant town appeals. Reversed.

Sinclair & Eaves, for appellant.
E. J. Justice, for appellee.

MONTGOMERY, J. The authorities of the town of Marion in 1881 commenced to use a part of the right of way of the Southern Railway Company as a street. It seems that the street was too narrow to permit of sidewalks on both sides thereof, and that up to 1889 a sidewalk was made and kept up on the north side of the street, when the sidewalk was changed to the south side of the street. The plaintiff, who was a resident of Marion, on her return to that place after an absence of a few months, on a train of the Southern Railway Company, upon going to her house, along this street, at 12 o'clock at night, took the old sidewalk or path on the north side of the street, instead of the well-kept walkway on the southern

*See *note*, 1 Mun. Corp. Cas. 489.
†See *notes*, 1 Mun. Corp. Cas. 58, 474, 489; 3 Mun. Corp. Cas. 32; 4 Mun. Corp. Cas. 123; 5 Mun. Corp. Cas. 146, 566.
‡See *notes*, 2 Mun. Corp. Cas. 27; 4 Mun. Corp. Cas. 648; 5 Mun. Corp. Cas. 278, 568.

side, and fell into a hole in the path, whereby she sustained personal injury, and instituted this action against both the railroad company and the town of Marion for the recovery of damages therefor. She alleged that she had often walked along that path, and that when she left Marion in January it was in good condition. The defendants, in their answer, averred that "she [plaintiff] knew of her own personal knowledge that the north side of said thoroughfare was not constructed, or prepared, or intended to be used by foot passengers, and that the corporation of Marion had provided a sidewalk for foot passengers on the south side thereof, of easy access, and perfectly safe; and this defendant further alleges that the plaintiff had knowledge of the excavation, and voluntarily and carelessly, through inadvertence, or indifference to exercise due care, and negligently and for convenience, refused to go upon the sidewalk prepared for foot passengers, and took the chance of the dangerous path that led over the washout, and was injured, if at all, by her own contributory negligence." After the pleadings were read, the defendant town of Marion moved to dismiss the action on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it did not allege a demand upon the town under section 757 of the Code. There was no error in the refusal of his honor to sustain this motion. In Shields v. Town of Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293, this court unanimously decided that only actions arising ex contractu are contemplated under section 557 of the Code, and that that section does not apply to actions ex delicto. The opinion was written by Justice Furches for the court, and he discusses the question clearly and forcibly, and at some length, going into the reason of the matter. In that opinion the court said: "This motion has received our careful attention, and has given us some trouble. But after a thorough consideration of the matter, we have come to the conclusion that section 757 of the Code does not apply to an action like this, for unliquidated damages." That part of the opinion in that case has been three times affirmed by unanimous decisions of this court. Frizby v. Town of Marshall, 119 N. C. 570, 26 S. E. 251; Sheldon v. City of Asheville, 119 N. C. 606, 25 S. E. 781; Nicholson v. Commissioners, 121 N. C. 27, 27 S. E. 996. It does seem that, if there is anything in the doctrine of stare decisis, it ought to be applicable to the point which we have been discussing. We call it a point, because it does not reach the dignity of a principle of law or a rule of property. His honor, after setting out the contentions of the respective sides to the jury, instructed them "that, though she [plaintiff] may have known of the existence of this defect prior to this time, yet the court further charges you that she is not required to carry around in her memory the defect in the street, and if she may have known of its existence at the time she did not think about it.

and was injured, that would not be contributory negligence." We think there was error in that instruction. The court most probably had reference to the decision in the case of Russell v. Town of Monroe, 116 N. C. 720, 21 S. E. 550. It was there held that all persons had a right to assume that the authorities of a town have used ordinary care in the discharge of their duty, and that the streets are in proper condition, and that the plaintiff in that case "was not required to see and treasure up in her memory the location of every defective place in the sidewalk which she had or might have seen during the daytime, nor was she expected to see all such places." But in that case the plaintiff herself testified that she had been living in Monroe only one year, and had been up town very little, and had never seen the hole before. In the case before us the plaintiff had been long a resident of Marion, and had been thoroughly familiar with the walk, having traveled it hundreds of times, as she testified. Now, if she knew that that hole was in the path, and at night walked along it, and, through forgetfulness, carelessly walked into it, she negligently contributed to her own injury. It was not reasonable care on her part to forget such a menace to her safety; and, even if it should be conceded that, if the town was negligent, if she, through the want of proper care and prudence, contributed to her injury, both parties being negligent, she cannot recover. In Bruker v. Town of Covington, 69 Ind. 33, it was decided that where a party knows of the existence of an open cellar way in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself, even if he had forgotten the existence of the obstruction; and if he receives injury from falling into such cellar way he is chargeable with contributory negligence, and cannot recover damages. There are many cases to the same effect cited in the case of Walker v. Town of Reidsville, 96 N. C. 382, 2 S. E. 74, to which case we refer as authority for our ruling in this matter. There is nothing in Bunch v. Town of Edenton, 90 N. C. 431, inconsistent with what we have here decided. In fact, the decision in that case is a support for the decision in this. But, besides, if the authorities of a town make and keep in repair a good sidewalk on one side of a street, and leave on the other side an abandoned and neglected walk, and those facts are known to a person who chooses, in the nighttime, to walk along the neglected path, instead of upon the safe walkway, and such person be injured by reason of a defect in the path along which he chooses to walk, then there is contributory negligence on the part of the injured person, to say the least, and there can be no recovery for the injuries sustained. For the error in the charge of the court as pointed out there must be a new trial.

DOUGLAS, J., dissents.

MANSFIELD *v.* MAYOR, ETC., OF CITY OF NEW YORK *et al.*

(Court of Appeals of New York, Dec. 11, 1900.)

[58 N. E. Rep. 889.]

Construction of Sewer—Injury to Property*—Action on Contract—Intervention.—Where a municipal contract for the construction of a sewer requires the contractor to indemnify the city for damages and costs resulting from injuries received through his negligence in performing the contract, and authorizes the city to retain a portion of his compensation until all claims for damages have been settled, a person whose property has been injured through the contractor's negligence, but who has failed to institute suit therefor, cannot intervene in an action against the city by the contractor to recover his compensation.

Appeal—Judgment.—Where a cause is reversed, and the facts disclosed show that the respondent could not possibly recover on a new trial, it is not error to enter an absolute judgment against him, instead of remanding the case for a new trial.

Appeal from supreme court, appellate division, First department.

Action by William Mansfield against the mayor, aldermen, and commonalty of the city of New York to recover money earned under a sewer contract. Edward Gustaveson intervened and claimed damages for negligence in building the sewer. From a decision of the appellate division reversing a judgment in favor of defendant Gustaveson (44. N. Y. Supp. 229), he appeals. Affirmed.

Appeal by the defendant Gustaveson from a judgment of the appellate division, First department, reversing a judgment in his favor against the respondent, and awarding judgment absolute against the appellant. The plaintiff, Mansfield, in September, 1887, sued the defendant, the mayor, aldermen, and commonalty of the city of New York, to recover a balance of $1,000 alleged to be due him on contract with the city for the construction of a sewer. The city answered, admitting the contract, the construction of the sewer, and nonpayment of the balance of $1,000, and alleged that it retained the same, under the terms of its contract with plaintiff, to indemnify it against a claim presented by the appellant, Gustaveson, for damages alleged by him to have been done to his real estate by plaintiff's negligent and improper work in constructing the sewer; that no evidence had been presented to the city that the claim had been settled; and that the city was willing to pay plaintiff upon proof of the discharge of such claim. Gustaveson in December, 1891, upon notice to the parties—the plaintiff not appearing, the city opposing—procured an order that he be made a party defendant and that the complaint be amended by setting out his interest, and that he be permitted to answer. The plaintiff amended his complaint by making Gustaveson a party, again setting forth his cause of action against the city, and adding that Gustaveson made claim

*See Uppington *v.* City of New York, 5 Mun. Corp. Cas. 366, and *note*.

to damages as aforesaid in the sum of $750, but that the claim was not valid. Gustaveson, by his answer, alleged that the plaintiff, by his negligent and improper work in constructing the sewer, had undermined a portion of his lot and the corner of his house thereon, to his damage $750, and then alleged the contract between the plaintiff and the city, and that he had given the city notice of his claim and lien on the moneys due and to become due to the plaintiff to the extent of $750, and that the city is retaining a sufficient sum therefrom to pay the said claim; and he demanded personal judgment against the plaintiff, and judgment against the city for the payment thereof by the city out of the fund retained. The city served no further pleading. The contract provided: (1) That the city might retain sufficient moneys from the contract price "to pay off, satisfy, and discharge" such liens for labor and materials as had been duly filed under the lien law of 1878, and notice thereof given to the proper authorities. (2) And the said party of the second part hereby further agrees that he will indemnify and save harmless the parties of the first part against and from all suits and actions of every name and description brought against them, and all damages and costs to which they may be put by reason or on account of any injuries or damages received or sustained by any party or parties, or his or their property, by or from the said party of the second part, his agents or servants, in the construction of said work, or by or in consequence of any negligence or carelessness in the performance of the work, or by or on account of any act or omission of the said party of the second part, or his agents or servants; and the said party of the second part hereby further agrees that the whole or so much of the moneys due to him under and by virtue of this agreement as shall or may be considered necessary by the commissioners of the department of public parks shall or may be retained by the said parties of the first part until all such suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of the said commissioners." An ordinance of the city directed that "in all contracts for work for the corporation upon any of the public buildings or in any public street or place, in the performance of which accidents or injuries may happen to the person or property of another, a provision shall be inserted that the contractor shall place proper guards for the prevention of accidents, and shall put up and keep at night suitable and sufficient lights during the performance of the work, and that he will indemnify the corporation for damages or costs to which they may be put by reason of injury to the person or property of another resulting from negligence or carelessness in the performance of the work." Rev. Ord. 1880, p. 121, § 11. The case came on for trial at the equity term. The plaintiff moved to strike it from the calendar upon the ground that it was a common-law action. The motion was denied. The plaintiff

took an exception and withdrew. The trial proceeded between the defendants. The defendant Gustaveson proved the injury and how it was caused, and the filing of the proper notices with the city. There was no controversy about the facts, and the court directed judgment for Gustaveson against the plaintiff for $750 and costs, and that the city pay the same out of the fund it retained, and, if the fund did not remain in the hands of the city, that it pay the judgment in the same manner as it pays other judgments against it. The city appealed. The plaintiff has not appealed.

L. Laflin Kellogg, for appellant.

John Whalen, Corp. Counsel (Theodore Connoly, of counsel), for respondent.

LANDON, J., (after stating the facts). We think this judgment should be affirmed. There is no allegation in the answer of the appellant, which is practically his complaint, that the city was primarily liable for the damages for which judgment was directed against the contractor, either as the author of his acts, his master, or joint wrongdoer with him, or as his surety. No such issue was tendered or has been tried. The city, pursuant to its ordinance, and in order to protect itself if by possibility it should be cast in damages because of the negligence of the contractor, agreed with him for indemnity against such contingent liability, and to that end withheld the balance otherwise due upon his contract, because meantime this appellant had presented to it a notice of the claim upon which he has now recovered a judgment in this action against the contractor. By the contract the city has a right to retain this money until proof is presented to it that the claim is satisfied. The contract did not provide that the city might pay the claim and charge the contractor with the amount. It can only charge the contractor with it in case it shall, because of its relations with him, be cast in damages for his wrong to the appellant, and thus be compelled to pay what, as between the contractor and itself, the contractor should pay. No attempt has been made to fix an original liability upon the city for the injuries done by the contractor to the appellant. It has had no day in court upon that question, and hence it has the right to retain the fund until that stage of the case is reached, if meantime the contractor does not satisfy the appellant's judgment. The city holds no money for the appellant, but simply to protect itself against the contingency contemplated by its contract with the contractor. It could take this indemnity without incurring any obligation to the appellant. French v. Vix, 143 N. Y. 90, 37 N. E. 612.

The appellant's contention that he is entitled to be subrogated to the rights of the city in and to the fund it retains fails, because of the reasons already stated. Subrogation is the substitution in place of the creditor of one, usually a surety, who, under the compulsion of necessity, or for the protection of

his own interests, has discharged a debt for which, as between himself and another, the latter is primarily liable. In such case the surety or party paying is entitled to the security, benefits, and advantages held by the creditor. 2 Beach, Mod. Eq. Jur. § 798. If the appellant had tendered the city the issue of its liability for the contractor's acts, and had recovered judgment against it upon that ground, then the city, upon payment of the judgment, might ask, under its contract with him, if it should need to do so, to be subrogated to the appellant's judgment against the contractor, so that it could assert the judgment against the contractor's demand for payment of the unpaid balance upon his contract. But, as the case stands, the contractor is the indemnitor, but not yet the surety of the city, having agreed to save it harmless in case the latter should be made liable for his defaults. When that event happens, the city, upon discharging its liability to the appellant, will at the same time pro tanto discharge its liability to the contractor.

The case is clearly distinguishable from Merchants' & Traders' Nat. Bank v. Mayor, etc., of City of New York, 97 N. Y. 362. That action was to determine the conflicting claims of the assignee of the contractor, and parties who had filed notices of claims for labor and materials, to the unpaid part of the contract price retained by the city. There was no lien law at that time, and thus the city had not retained the money to indemnify or protect itself against liens for labor and materials. But the ordinance of the city, passed pursuant to law, required that all contracts for work done for the city should provide that the last installment of the contract price should be retained by the city until certain prescribed evidence should be given that all persons who had furnished labor or materials to the contractor, and given the proper notice thereof, and also that some balance therefor was unpaid, had been satisfied. It was held that, as the city did not retain the money for its own protection, it must have been the meaning of the ordinance, and of the contract made in compliance with its requirement, that it held the money for the protection of the persons furnishing labor and materials, and as their trustee, to pay it to them. Bank v. Winant, 123 N. Y. 265, 25 N. E. 262, is to the same effect. In the case before us the city retained the balance for its own protection, and not for the appellant's benefit. In Bates v. Bank, 157 N. Y. 322, 51 N. E. 1033, a building contract provided that no payment should be made to the contractor until he had obtained a certificate from the county clerk that no unsatisfied liens were on file. This was held to be for the benefit of the owner, and not as creating any obligation in favor of third parties furnishing labor or materials. That the city is a public municipality does not enlarge the scope of its contract obligation. That fact might have been important if the issue had been tendered it that the contractor was solely

chargeable because he had assumed to discharge a public duty, and was liable because through him the public duty had been malperformed, or not performed at all, to the appellants injury, as in Robinson v. Chamberlain, 34 N. Y. 389, and cases of its class.

The appellant insists that it was error for the appellate division to direct absolute judgment against him upon its reversal, instead of awarding a new trial. We think that it does appear that the appellant would certainly be defeated upon a new trial. New v. Village of New Rochelle, 158 N. Y. 43. 52 N. E. 647. The city is not the trustee of a fund in dispute. The contractor sued for an alleged balance due him, and the appellant has no assignment lien or interest in it. The city may, under the powers conferred and duties enjoined upon it by law, either express or implied, incur obligations either in performance or neglect of performance, and in some cases in malperformance, of its powers and duties. But, before it can be charged with the obligations which one individual owes to another, the grounds for that charge should be clear. It is not enough that in the particular case it can do so without harm to itself, or that it has been indemnified against such harm, or even that the individual owing the duty does not object. It must appear that it is its duty to do so. We think it was not error to direct judgment absolute. The judgment should be affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

TOWN OF NEWCASTLE *v.* LAKE ERIE & W. R. CO.

(Supreme Court of Indiana, June 6, 1900.)

[57 N. E. Rep. 516.]

Railroads—Authority to Occupy Streets*—Statute.—Under the fifth subdivision of section 3903, Rev. St. 1881, of Indiana, railroad companies are authorized to construct their roads across any highway which their lines intersect, but not to occupy streets longitudinally.

Same—Same—Municipal Powers.—In Indiana municipalities have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided the use does not destroy or unreasonably impair the street as a highway for the general public.

Same—Nuisance.—The mere fact that a railroad is constructed in a street does not make it a nuisance.

Same—Prescription.—An easement which a municipal corporation has the power to grant may be acquired from it by prescription.

Same—Same—Estoppel.—Under the laws of Indiana, where a railroad company has occupied a street with its tracks over twenty years for any railroad purposes, without objection on the part of the municipality, the latter is estopped by its laches from denying that the company is not so occupying the street under a municipal grant; and the company has acquired a prescriptive right to such easement.

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*See *notes*, 1 Mun. Corp. Cas. 513; 2 Mun. Corp. Cas. 465; 4 Mun. Corp. Cas. 571.

Town of Newcastle *v.* Lake Erie & W. R. Co

Appeal from circuit court, Hancock county; C. G. Offutt, Judge.

Action by the town of Newcastle against the Lake Erie & Western Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

M. E. Forkner and Marsh & Cook, for appellant.

John B. Cockrum, Eugene H. Bundy, W. A. Brown, and W. E. Hackedom, for appellee.

BAKER, J. Suit by appellant to compel appellees to remove their railroad tracks from a street. The complaint, in substance, alleges that Locust street, as originally platted, was 50 feet wide, and ran north and south from the north line of the original plat of the town of Newcastle to Broad street, which was the second cross street south; that Locust street has been continuously, for more than 65 years, opened, improved, and maintained as a public street of the town; that the appellees and their grantors without right entered upon the street and constructed and maintained, and appellees now maintain and operate, a permanent side track in and along the east side of the street from its northern terminus to Broad street; that they, without right, constructed and now maintain a permanent side track from the northern terminus of Locust street, crossing the alley entering Locust street at the northern terminus, and running south, bearing to the west, along the west side of Locust street, to within the limits of the street, a distance of 350 feet; that by the construction and maintenance of the side tracks the northern terminus of the street and the alley entering therein are wholly obstructed; that appellees use the tracks for switching, yard, and storage purposes, standing their cars across the alley, and encroaching upon Locust street, limiting its width by the extent of the width of the side tracks; that the side tracks constitute a permanent and unlawful obstruction of Locust street and the intersecting streets and alleys, and are a nuisance to the citizens of the town and the public in general, and by reason thereof the street cannot be properly improved, and cannot be used for the ordinary purposes of a street; that appellees have been duly notified to remove their tracks without the limits of the street, but have failed and refused to remove them, and claim the right to maintain their tracks within the limits of the street, and to use the same and appropriate the street to their exclusive use, to the injury of all the citizens of the town and the public generally; that to allow their tracks to remain in the street will permanently obstruct the street and the travel thereon, and will be a permanent and lasting injury to the general public and the citizens of the town. Answer in general denial and two affirmative paragraphs. Demurrer to each affirmative answer overruled. Reply in denial. Trial by court. Special finding of facts and conclusions of law. Exceptions reserved to each adverse ruling.

The errors assigned are: "Overruling appellant's demurrers to the affirmative answers, overruling motion for a new trial, and that the court erred in its conclusions of law stated on the special finding of facts."

The second paragraph of answer avers "that appellees for more than thirty years have used and maintained the side tracks and switches named in the complaint by leave and license of the town of Newcastle, and have expended large sums of money in building, maintaining, and equipping said side tracks and switches, with full knowledge and consent of the plaintiff, and without objection on her part." Appellant claims that this answer does not meet the complaint, because it neither denies nor justifies the use of the tracks "for switching, yard, and storage purposes." The complaint shows that the town demanded that appellees remove their tracks from the street, and that appellees refused because they claimed to have a lawful right to maintain their tracks in the street. The complaint does not show any use of the street for switching, yard, and storage purposes that would necessarily be unlawful, except on the basis that appellees have no right in the street at all. If appellees had a valid right to use the street, the town's governmental and police powers would not be abated or diminished. Elliott, R. R. § 1082. The complaint, however, is not based on appellees' refusal to obey regulations of the use, but is founded on the claim of appellees' usurpation. Therefore this paragraph is not a partial answer.

In substance, the third paragraph of answer is that in 1868 appellees' predecessor constructed a side track 300 feet in length along the west side of Locust street, from the main line of appellees' railroad, at the northern terminus of Locust street, to Vine street, which was the first cross street south; that at the same time appellees' predecessor built another side track along the east edge of Locust street, from the north end of Locust street, where it crosses appellees' main track, south to the north line of Broad street; that in order to build this track it was compelled to, and did, build a high embankment on and along the east side of Locust street, and lay its tracks on the embankment thus built; that the track was laid in 1866, and forms the west bank of a ravine; that they have since that time kept up and maintained the side tracks, at a large expenditure of money, without any objection by appellant; that the side tracks are not now, and never have been, any impediment or obstruction to the free use of Locust street by the general public; that the side tracks were built at a great cost, and have been maintained and repaired at a large expense each year since; that they are now, and always have been, necessary to the proper management of appellees' road and its business; that for more than 30 years appellant has stood by, with full knowledge of all the facts, without any objection. The court found the existence of Locust street as stated in

the complaint; that the street was laid on the edge of a ravine; that in 1868 appellees' predecessor built a side track along the east side of Locust street, and within the platted limits thereof, by constructing an embankment from 10 to 12 feet high, which was on a level with the street, and formed a bed and retaining wall for the street; that this east side track did not encroach upon the traveled portion of the street, and has never interfered with or diminished the travel upon the street, or the means of travel thereon; that in 1868 appellees' predecessor built a depot and platform, upon piling, in the ravine, just east of this east side track, which has been continuously used as a freight depot since 1869; that at about the same time appellees' predecessor constructed its west side track, but no part thereof is now, or ever has been, within the limits of Locust street, except 40 feet of the east rail at the south end; that all that part of Locust street lying west of the west rail of the east side track is of the average width of 36 feet, and is convenient for travel; that the side tracks were constructed at a cost of $2,000, and the depot $800, and have been maintained at an annual expense of $280; that the side tracks have been used in the ordinary course of business, and in a reasonable and proper manner; that the side tracks and depot have been regularly listed for taxation for state, county, and municipal purposes; that neither the town nor any of its officers has ever made any objection to the side tracks being so located, or to the uses made thereof, but the town and its officers have stood by for more than 30 years, having full knowledge that the companies had expended their money in constructing and maintaining the side tracks and depot, and exacting municipal taxes thereon. On these facts the court concluded that the law was with the appellees. Appellant claims that, under the third paragraph of answer and the finding of facts, appellees have no right to maintain their side tracks in Locust street. Appellees contend: First, that the statute for the organization of railroad companies gives them the right to go upon streets without the consent of the municipality; and, second, that, if a grant from the municipality were necessary, appellant is estopped from denying that a grant exists.

The fifth subdivision of section 3903, Rev. St. 1881 (section 3903, Horner's Rev. St. 1897; section 5153, Burns' Rev. St. 1894), relating to the general powers of railroad companies, reads: "To construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to necessarily impair its usefulness or injure its franchises." The control of streets, as well as of all other public highways,

is primarily in the legislature. But the legislature has delegated to municipalities the exclusive control of their streets and alleys. As the legislature gave, so that body may take away or modify, the power. There is nd doubt of the legislature's authority to grant railroad companies the right to lay their tracks longitudinally upon the streets of a municipality without its consent or over its objection. Dill. Mun. Corp. § 701; Elliott, R. R. § 1076; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Chicago, N. & S. W. R. Co. v. Mayor of Newton, 36 Iowa, 299; Ingram v. Chicago, D. & M. R. Co., 38 Iowa, 669; Cook v. Chicago, M. & St. P. R. Co., 83 Iowa, 278, 49 N. W. 92; Borough of Millvale v. Evergreen Ry. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369. The question is, to what extent does the statute above quoted impair the control of a municipality over its own streets? If the words "to construct its road upon or across any highway" were not limited by any other parts of the sentence, it might be claimed that railroad companies were given the right to go upon highways longitudinally. But they are limited to going upon or across any highway that their railroads intersect, and are commanded to restore to its former state, as nearly as practicable, any highway thus intersected. The legislature may well have believed that it was proper and necessary for railroad companies to have the right to cross streets without the consent of the municipality, and at the same time that it was neither proper nor necessary for them to have the power to occupy streets longitudinally; and the sentence, as a whole, indicates that such was the legislative intent. The word "upon" is not eliminated by the construction; for the legislature, if it chose, might have restricted the right to cross a highway to going under or over it, and not upon it at grade. "The usual and ordinary powers of municipal corporations to regulate streets and keep them free from obstructions are not sufficient, it is believed, to empower them to authorize the use thereof for the purpose of constructing and operating thereon a steam railway, as these powers are not to be enlarged by construction, and were not conferred for this purpose." Dill. Mun. Corp. § 705. If the question were an open one in this state, it would be well to inquire if Dillon has not enunciated the correct rule. But by a long line of decisions it seems to have been thoroughly settled that municipalities in this state, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided that the use does not destroy or unreasonably impair the street as a highway for the general public. Elliott, R. R. § 1089. In Tate v. Railroad Co., 7 Ind. 479, it was said, "Nor is it intended to intimate that it is not in the power of the city to authorize the railroad company to lay a track at the grade of Williams street, and thus use it for the passage of their cars in common with other public and private conveyances. To that extent the munic-

ipal authority may be conceded." The court said in Indianapolis & C. R. Co. v. State, 37 Ind. 489: "We are of the opinion that the common council of a city have no authority to make contracts for the sale or letting of any public street or any portion thereof. They may, it is true, grant an easement in the street to a railroad company, to use the street in common with the public." From Burkam v. Railway Co., 122 Ind. 344, 23 N. E. 799: "We have no doubt that an abutting owner has a proprietary right in the street, of which he cannot be deprived without compensation. But it by no means follows from this that a city, in granting a right to a railroad company to use a street, deprives the abutter of his property. The grant by the municipal corporation transfers no proprietary rights of the abutter. It simply grants the privilege the city has power to grant. In granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power." The same doctrine is expressly or impliedly recognized in the following cases: Protzman v. Railroad Co., 9 Ind. 467; Railway Co. v. Boden, 10 Ind. 96; Railroad Co. v. O'Daily, 12 Ind. 551; Cox v. Railroad Co., 48 Ind. 178; Railway Co. v. Smith, 52 Ind. 428; Railroad Co. v. Scott, 74 Ind. 29; State v. Louisville, N. A. & C. Ry. Co., 86 Ind. 114; Kistner v. City of Indianapolis, 100 Ind. 210; White v. Railroad Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Railway Co. v. Eisert, 127 Ind. 156, 26 N. E. 759; Haus v. Railroad Co., 138 Ind. 307, 37 N. E. 805. These decisions cover a period of more than 40 years, and the doctrine has become a rule of property. Nearly every town and city in the state has a railroad running longitudinally along some street. It is too late now to inquire into the justness and validity of the rule.

The finding does not state that appellees' predecessor entered upon Locust street under a grant from the municipality. From this, appellant argues that the tracks are now unlawfully in the street, and that the town is not estopped from requiring their removal. It is true that the facts pleaded in the third paragraph of answer and the facts found by the court do not constitute an estoppel by conduct. There was no concealment or misrepresentation by the town. Nor did the other elements of estoppel by conduct exist. Abicht v. Searls (Sup.) 57 N. E. 246. But the question is whether appellant is not estopped by its laches; that is, whether appellees have not acquired a prescriptive right. Appellant says that the construction and maintenance of the tracks in the street without an express grant from the town constituted a public nuisance per se, and that no right by prescription could be acquired. A particular method of construction or operation may be a nuisance, but the mere fact that a railroad is constructed in a street does not make it a nuisance. State v. Louisville, N. A. & C. R. Co., 86 Ind. 114. The legislature has given the company the power to accept, and the

municipality to grant, the right to lay tracks in the street. City of Valparaiso v. Bozarth, 153 Ind. 536, 55 N. E. 439, and the cases therein cited, which hold that a structure built upon a street by a private person is a public nuisance per se, and that no prescriptive right would accrue from any length of user, are not applicable. The private structure is a nuisance per se because the law would not permit the municipality to authorize its erection. Prescription is the presumption of a grant. There can be no presumption of a grant if the alleged grantor is lacking in legal capacity, and if the subject-matter of the grant is unlawful. No length of user would give a railroad company the absolute ownership of a street, for that is not the municipality's to grant. Railroad Co. v. Ross, 47 Ind. 25. But property that a municipality has the power to convey may be acquired from it by prescription. City of Bedford v. Willard, 133 Ind. 562, 33 N. E. 368, 36 Am. St. Rep. 563, and note. In Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373, and in People v. Collis (Sup.) 45 N. Y. Supp. 282, it was held that, the legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued use of such a structure for more than 20 years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of a grant. If the grant in this case be considered in the nature of a mere license, it has become irrevocable by reason of appellees' expenditures with the knowledge of appellant. Buchanan v. Railroad Co., 71 Ind. 265; Joseph v. Wild, 146 Ind. 249, 45 N. E. 467, and cases there collated.

None of the matters presented in the motion for a new trial is material. The controlling facts in the case are undisputed. Appellees' possession extended over a period of 30 years. It was peaceable. It was continuous. It was open and known to appellant. It was exclusive to the same extent it would have been exclusive under an express grant; that is, the town, by an express grant, could not deprive itself of governmental and police powers over the part of the street occupied by the tracks. It was adverse (that is, the use was such as would have exposed appellees, at any time within 20 years, to an action, if in fact they did not have an express grant), and the open dominion of the tracks, and the return thereof for taxation, were as high evidences of a claim of right as any that would follow possession under an express grant. Judgment affirmed.

STATE *ex rel.* CITY OF ST. PAUL *v.* MINNESOTA TRANSFER RY. CO.

(*Supreme Court of Minnesota, June 1, 1900.*)

[83 N. W. Rep. 32.]

Railroads—Failure to Perform Corporate Duties—Mandamus.*—A railroad company is a *quasi* public corporation, and all its rights and powers are conferred upon it, not merely for the benefit of the corporation itself, but also in trust for the benefit of the public; and whenever it neglects or fails to perform any of its corporate duties, it may generally be compelled to perform the same by mandamus.

Same—Same—Constructions of Crossings.—Mandamus will lie to compel a railway company to construct and maintain proper crossings, such as viaducts or bridges, and suitable approaches thereto, at all points where their lines of railway intersect previously established public thoroughfares, if such crossings are necessary for public use.

Same—Duty of Railway Corporation Occupying Public Thoroughfare to Keep Same in Proper Condition.—At common law the duty rests upon a railway corporation, when it occupies a public thoroughfare with its tracks, to restore the same, by some reasonably safe and convenient means, to its former condition of usefulness. And the duty is a continuing one, and the way must be kept in repair by the corporation whose act has made the duty necessary.

Municipal Contract—Ultra Vires.—Assuming in this case that the relator city entered into a contract with defendant railway company of the nature set out in the answer herein, it is *held*, such contract was *ultra vires* and of no validity. It was not binding upon either party.

Overhead Bridge—Contract between City and Railway—Ultra Vires.—Where the duty rests upon a railway corporation to restore a public way to its former condition of usefulness, a municipality cannot enter into a valid contract with such corporation whereby it surrenders its power to compel the performance of such duty. It cannot contract with such corporation that it will "maintain" a certain bridge, to be erected by either or both parties, "for all future time." Such an agreement on the part of a municipality is beyond the power of municipal officers, and is contrary to public policy, and of no effect.

Authority of Municipal Officers†—All Persons Affected with Notice of.—It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make a contract.

Overhead Bridge—Ultra Vires Contract between City and Railway—Estoppel.—A municipality is not estopped in such a case to assert the invalidity of the contract by the fact that a bridge has been built by both parties, as the result of a compromise between the municipal authorities and the railway officials, and has thereafter been kept in repair by the municipality for a number of years.

Duty of Railway to Restore Street—Effect of Charter Provision.—*Held*, that it was not intended by the legislature, when enacting a charter provision of the relator city (Sess. Laws 1885, c. 7, § 3), to relieve railway corporations from the common-law duty before mentioned.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Hascal R. Brill, Charles E. Otis, and George L. Bunn, Judges.

Application by the state, on the relation of the city of St. Paul, for a writ of mandamus against the Minnesota Transfer

*See *note*, 2 Mun. Corp. Cas. 350.

†See *note*, 4 Mun. Corp. Cas. 571, 740.

See principal case with briefs citing numerous authorities, 50 L. R. A. 656.

Railway Company. From an order granting the writ, defendant appeals. Affirmed.

W. H. Norris, for appellant.
Jas. E. Markham and Carl Taylor, for respondent.

COLLINS, J. Appeal from an order directing that a peremptory writ of mandamus issue, requiring and compelling the defendant transfer-railway company to proceed forthwith to repair the bridge described in the pleadings in accordance with certain plans and specifications attached to, and made a part of, the petition for such writ. The bridge in question is the one now in use upon University avenue, in the city of St. Paul. It is more than 1,300 feet in length, and is an overhead crossing of a large number of defendant's tracks, which have been laid over the avenue at grade, and have been, and now are, in constant use as a part of defendant's system of transfer tracks. The latter are close together, cross the avenue obliquely, and occupy a space of about 350 feet in width,—a little more than one-third of the length of the bridge. The defendant's land has not far from 1,300 feet frontage on the avenue, so that the bridge practically spans the entire tract. An overhead crossing having become necessary, the president of defendant company made a proposition in writing to plaintiff's common council to construct the same of a certain width, and in accordance with plans to be satisfactory to the city engineer. Conditions were imposed upon the city, in the proposition, as follows: "The city of St. Paul to agree to construct all the necessary approaches on both ends of said bridge, and pay any damages to owners of property abutting on said approaches; and, on the completion of the bridge in accordance with the plans as accepted by the city engineer, the city of St. Paul is to maintain the same for all future time. The city of St. Paul to further agree to prohibit all crossing at grade of tracks of the Minnesota Transfer-Railway Company after the said bridge is completed, ready for use; and, in the event that permission is given by said city to any company to construct a motor line, an elevated railroad, or any other railway upon University avenue across the grounds of the Minnesota Transfer-Railway Company, such road shall not be permitted to cross the tracks of the tranfer company at grade, but upon a bridge to be constructed at the expense of said elevated railroad or motor line, and in no manner at the expense of the Minnesota Transfer-Railway Company; and no permission shall be given any elevated railroad or motor line to build a bridge over the tracks of this company on University avenue, unless, coupled with such permission, it is required that the bridge be built to conform to that which the Minnesota Transfer-Railway Company hereby proposes to build, so far as length of spans and clearance above the rails of the tracks of the Minnesota Transfer Railway Company are concerned." In addition, the

proposition was made subject to approval by defendant's board of directors. Later the city council instructed, by resolution, the proper officers to enter into a contract with defendant corporation for the construction of the bridge in accordance with the proposition. The bridge was built at an expense of about $98,000 to defendant, and of about $25,000 to the city. It was much more of a structure than defendant deemed necessary for public use at the time, but, according to the answer, defendant "participated in the construction thereof, relying upon the good faith of said city and of its officers and common council, and upon the aforesaid acceptance of said proposition and report as a valid and permanently binding agreement of said city to maintain and repair the said bridge for all future time, and at its own sole expense." And evidently it was much longer than was necessary for the protection of the public when crossing defendant's tracks. It is further averred in the pleading just mentioned that ever since its construction the city has maintained the bridge, and every part, and has made all repairs thereon, except in one instance, where the damages were occasioned by a collision of cars operated by defendant itself. The order for judgment was upon the petition and answer.

1. It is argued by defendant's counsel that the order appealed from "was in plain defiance of Gen. St. 1894, § 5976, for the reason that there is a plain, speedy, and adequate remedy in the ordinary course of law." The suggestion of counsel is that, if defendant is bound to repair the bridge in question, the plaintiff city can, after demand, make the necessary repairs, and in an action at law recover their cost from his client. Two cases are cited by counsel in support of this claim. Pennsylvania R. Co. v. Borough of Irwin, 85 Pa. St. 336, and Wellcome v. Inhabitants of Leeds, 51 Me. 313. Neither is in point. If defendant is bound to make the necessary repairs, the estimated cost being upwards of $10,000, the character and extent thereof is a question which neither the company nor the city can determine absolutely without the assent of the other. Like all matters involving a controversy concerning public duty and private right, it is to be adjusted and settled by judicial inquiry and determination. The plans and specifications prepared by the relator's engineer and approved by its common council, and the direction to the defendant to repair the bridge in accordance with such plans and specifications, were not conclusive upon the defendant, and did not fix and establish the measure of its duty with reference to these repairs. These are matters, if put in issue, for the determination of the court upon any hearing. If the city should make repairs, and attempt to recover the cost of defendant, the latter would deny any liability, and would unquestionably depend upon the further ground that it had been given no opportunity to be heard when the necessity arose, and that the character and extent of the repairs could

not be determined by the city alone. The latter would be unable to have these matters passed upon in advance, and when making repairs would be simply taking the chances on its acts being afterwards approved and sustained by the courts. If this be so, it had no plain, speedy, or adequate remedy at law, and could therefore proceed as it did. The general rule is that "a railroad company is a quasi public corporation, and all its rights and powers are conferred upon it, not merely for the benefit of the corporation itself, but also in trust for the benefit of the public; and, whenever it neglects or fails to perform any of its corporate duties, it may generally be compelled to perform the same by mandamus." State v. Missouri Pac. Ry. Co., 33 Kan. 176, 5 Pac. 772. See, also, State v. St. Paul, M. & M. Ry. Co., 38 Minn. 246, 36 N. W. 870; State v. Minneapolis & St. L. Ry. Co., 39 Minn. 219, 39 N. W. 153; State v. St. Paul & D. R. Co., 75 Minn. 473, 78 N. W. 87; High, Extr. Rem. § 320. Mandamus is certainly a suitable form of action to try the questions involved here.

2. The duty rested upon the defendant corporation, when it occupied the avenue with its tracks, to restore the same, by some reasonably safe and convenient means, to its former condition of usefulness. And this duty was a continuing one. The common-law rule is that, where a person or a corporation is given the right to build a railroad across a public highway, it cannot be destroyed as a thoroughfare, but the party obtaining such right is bound to restore or unite such highway at his own expense by some reasonably safe and convenient means of passage. No statute imposing this duty is necessary. "This duty includes the doing of whatever is necessary to restore the highway to such condition,—as, for instance, in case of a bridge, the approaches and lateral embankments, without which the bridge would be useless. This duty is founded on the equitable principle that it was their act, done in pursuance of their own advantage, which rendered the work necessary, and therefore they, and not the public, should be burdened with its expense." State v. St. Paul, M. & M. Ry. Co., 35 Minn. 133, 28 N. W. 4, and cases cited. And, if a performance of this duty makes it necessary to build a bridge, it is equally as necessary that it should be kept in repair. It must be maintained while the duty continues, that the public may be suitably provided for. The person or corporation creating the necessity can only be released from the duty by some act of the legislature. This rule is not very seriously disputed by defendant's counsel, but his position is that by reason of an acceptance of the proposition made to the city, to which we have referred, and the building of the bridge therein mentioned in accordance with plans prepared by the city engineer, defendant was relieved from any further duty in respect to the University avenue crossing, and is no longer liable under the common-law rule as to repairs and future maintenance.

3. While having under consideration defendant's claim of a grant of perpetual immunity from its otherwise binding obligation to keep the bridge in repair, we shall assume what is denied by the city attorney in his argument,—that the city did enter, in so far as it could, into a contract with defendant corporation to build a part of this bridge as proposed by defendant's president, and that in this contract the city accepted and agreed to abide by the conditions contained in the proposition, hereinbefore quoted in full,—one being that it was to maintain the structure "for all future time,"—and that the bridge in question was built and completed in strict compliance with a duly-executed contract, in all matters of form. The question then is, was it within the power, express or implied, of the city officials to enter into an agreement of this character which would be of any validity? Not only did the council appropriate city funds to and in the construction of a bridge which, in so far as it crossed the railway tracks, was made necessary by defendant's acts, and which, as a consequence, defendant was obliged to wholly construct, but it accepted conditions, and attempted to bind the municipality, for all future time, to maintain this bridge at that particular point. Without regard to what might be needed by the public at some future period, the council attempted to bind the city to repair and to keep in existence for all time a bridge but one-half as wide as the avenue across which defendant had laid a large number of tracks, evidently used as part of its transfer yard, and not merely for ordinary crossing purposes. The council went further than this. It attempted to bind the city not to cross the tracks at the surface grade or otherwise, nor to allow any street-car or traction company so to do, or to so cross at any other grade than that fixed by the height of the bridge. If such a contract could be upheld, the city, without any consideration whatever, and as a gratuity, gave away and waived, as was said by the court below, "a most valued right given to it at common law, viz. the right to compel the respondent to provide and forever maintain suitable and safe crossings on University avenue over its tracks and other grounds, a distance of over 1,300 feet, and it relieved the respondent for all time from any and all obligations in that behalf." Such an arrangement, ignoring entirely the question of consideration, was ultra vires. It was not binding on either party. It cannot be that the common council of 1888, by the passage of a resolution providing for the construction of a bridge 60 feet in width in a street 120 feet wide, to be perpetually maintained by the city, could limit or control the legislative action of its successors, or could abdicate its right, as future necessity should require, to compel the construction and maintenance of a bridge or viaduct of such dimensions, width, and construction as should, as nearly as may be, restore the street to its former condition of usefulness. We have already held that the power of municipal

authorities to contract in relation to a given matter does not carry with it, by implication, power to make a contract, even with reference to such matter, which shall cede away, control, or embarrass their legislative or governmental powers, or render the municipality unable in the future to control any municipal matter over which it has legislative control (Flynn v. Water Co., 74 Minn. 186, 77 N. W. 38, 78 N. W. 106; State v. St. Paul City Ry. Co. [Minn.] 81 N. W. 200), and also that a municipal corporation intrusted with power of control over public streets cannot, by contract or otherwise, irrevocably surrender any part of such power, without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the state (Nash v. Lowry, 37 Minn. 261, 33 N. W. 787). And, of course, it is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. Future conditions may require that the public thoroughfare be restored to its normal condition, so that there may be a grade crossing for all persons who may have occasion to cross on foot or in vehicles. This would compel the defendant's tracks to be put overhead or underneath the surface. And it is not improbable that in time the traveling public may need, for its use, the full width of the avenue, 120 feet, instead of the 60 feet now accorded. These things would be absolutely prohibited, should we sustain defendant's contention. The alleged contract was and is invalid. Counsel for defendant has cited the case of State v. Ensign, 54 Minn. 372, 56 N. W. 41, as in conflict with State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3. But there is no conflict, for the case first mentioned was not an action brought to compel a railway company to restore a street which it had crossed with its tracks to its previous state of usefulness, by bridging or otherwise. It was a proceeding under the charter of the city of Duluth, in which a viaduct had to be built over railway tracks in connection with, and as a part of, a street improvement. A bridge over the tracks would have been a detriment, instead of what was required,—an improvement. The city, instead of assessing the benefits arising to the railway company, if any, accepted $50,000 from the latter in lieu of an assessment, and then assessed benefits to other property as provided by the charter. More than this, there was nothing in the record in that case which tended to show that the street involved had been laid out or used as a public thoroughfare before the railway company laid its tracks, and therefore no duty of the company, at common law or by statute, was shown to have been neglected. Counsel also urges that, as this bridge was the result of a compromise between the city and the defendant, the former is estopped from asserting the claim now made upon the latter. It was, urges counsel, the finality of a fair

and intelligent compromise. We are justified in saying that a very large proportion of bridges built by railway companies over their tracks, where highways are crossed, are the result of compromises,—many of them, the result of protracted litigation. There is frequently a difference of opinion between railway officials and city authorities as to when a necessity arises, and what is needed in the way of structures. Estoppel in this case, or in any other where a plain duty rests upon a party, cannot be predicated upon the compromise of some difference of opinion as to exactly what the performance of that duty requires. The rule relied on by counsel, that the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong, is against him; for here the ends of justice will be subserved by compelling the defendant to perform its duty. And no legal wrong is done to his client by compelling it to abide by its legal obligation to provide and maintain a suitable crossing over its tracks. We have referred to the claim of counsel that, under its charter, defendant was authorized to construct this bridge, and also to maintain it. It is true that by virtue of a charter provision (Sp. Laws 1885, c. 7, § 3) the city is given power to build "any bridge or bridges, and also the approaches thereto in any street or streets, highway or highways of said city, over railway tracks or other places." If the legislature had intended to relieve railway corporations from the duty imposed at common law in reference to public ways already in use, and then crossed by railway tracks, apt language would have been found in which to express the rule. As the section reads, we should have to infer altogether too much as to such intent. We are of opinion that an agreement on the part of the city to maintain this bridge for all time was beyond the power of the officers of the city, contrary to public policy, void, and of no effect, and that the order of the court below directing a peremptory writ of mandamus should be affirmed. It is so ordered.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte, & Northwestern Railroad Company, Plff. in Err., *v* OTTO J. MORASCH and Eliza Morasch, as the Next of Kin of Irene Morasch, Deceased.

(*Submitted April 18, 1900. Decided May 14, 1900.*)

[20 Sup. Ct. Rep. 819.]

Federal Railroad Receivers—Duty to Obey State Laws.—It is the duty of a receiver, appointed by a federal court to take charge of a railroad, to operate the road according to the laws of the state in which it is situated.

Same—Action for Injuries—Jurisdiction of State Courts.—Such a receiver is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing.

Erb *v.* Morasch

Power of City to Regulate Speed*—Interstate Commerce.—A city, when authorized by the legislature, may regulate the speed of railroad trains within its limits. Such regulation, even as to interstate trains, affects interstate trains only indirectly, and is within the power of the state, at least in the absence of congressional action in the matter.

Same—Same—Unreasonable Classification.—An ordinance prescribing six miles an hour as the maximum rate of speed for railroad trains within city limits, is not in conflict with that provision of the federal constitution which restrains a state from denying the equal protection of the laws, although a street railway, operated by steam power used only in dummy engines, is excepted from such regulation.

In error to the Supreme Court of the State of Kansas to review a decision sustaining an ordinance regulating speed of trains in a city. Affirmed.

See same case below, 60 Kan. 251, 56 Pac. 133.

The facts are stated in the opinion.

Messrs. B. P. Waggener and A. H. Horton for plaintiff in error.

Mr. George B. Watson for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court:

While in their briefs many matters are discussed with fulness and elaboration by counsel for plaintiff in error, we are of opinion that those of a Federal nature involved in this record are few in number and practically determined by previous decisions of this court. Of course, all questions arising under the Constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the state courts. Turner v. Wilkes County Comrs. 173 U. S. 461, 43 L. Ed. 768, 19 Sup. Ct. Rep. 464; Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. Rep. 77, ante, 77, and cases cited in opinion.

In September, 1888, the city council of Kansas City passed an ordinance regulating the running of railroad trains through that city. Sections 2 and 8 are the only ones material to the present controversy. They are as follows:

"Sec. 2. It shall be unlawful for any such engineer, conductor, or other persons having a railway engine or train of cars in charge to permit the same to be run along any track in said city at a greater speed than six miles an hour."

"Sec. 8. The provisions of this ordinance shall not apply to the Interstate Rapid Transit Railway Company, excepting with reference to funeral or other processions."

Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the state in which it is situated. 25 Stat. at L. 436, chap. 866, § 2; United States v. Harris, 177 U. S. 305, 20 Sup. Ct. Rep. 609, ante, 609.

Second, that he is liable to suit in a court other than that

*See 7 Rap. & Mack's Dig. 676-681; *note*, 4 L. R. A. 776.

by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing. McNulta v. Lochridge, 141 U. S. 327, 35 L. Ed. 796, 12 Sup. Ct. Rep. 11; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. Rep. 905.

Third, that a city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734; Cleveland, C. C. & St. L. R. Co. v. Illinois ex rel. Jett, 177 U. S. —, 20 Sup. Ct. Rep. 722, ante, 722. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress shall take action in the matter.

And, fourth, the sections quoted of the ordinance are not in conflict with those provisions of the 1st section of the Fourteenth Amendment to the Constitution, which restrain a state from denying the equal protection of the laws. This last proposition seems to be the only matter requiring anything more than a declaration of the law and a citation of decided cases.

The contention here is that the exception of the Interstate Transit Railway Company from the provision in reference to the speed of its trains creates a classification which is arbitrary and without any reasonable basis, and therefore operates to deny the equal protection of the laws. Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255. If there were nothing in the record beyond the mere words of the ordinance we are of opinion that that contention could not be sustained, because it is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts crossing or along streets constantly traveled upon by foot passengers and vehicles, while others may pass through remote parts of the city where there is little travel and little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced and where it is not in fact fenced, while another may pass through parts which permit of the fencing of the tracks and where its tracks are in fact fenced. Under those circumstances a difference of regulation as to the matter of speed would be perfectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains.

But in this case we are not left to any mere matter of pre-

sumption. The testimony discloses that the Interstate Rapid Transit Railroad is simply a street railroad connecting the cities of Kansas City, Missouri, and Kansas City, Kansas, operated at the time of the passage of the ordinance by steam power, but with that power used only in dummy engines, and, at the time of the accident involved in this case, by electricity. It is true that there is testimony that at or near the place where the accident happened parties thought the operation of the street railroad was more dangerous than the operation of the railroad of which the plaintiff in error was receiver, but the validity of such an ordinance is not determinable by individual judgments. It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and that existing it is for the city council to determine whether separate regulations shall be applied to the two. It is not strange that one witness differs from another in respect to the comparative danger of the two roads. One jury might also disagree with another in respect to the same matter. But neither witness nor jury determine the validity of state or municipal legislation. Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations. We see nothing else in this case calling for notice, and the judgment of the Supreme Court of Kansas is affirmed.

PAWCATUCK VAL. ST. RY. CO. *v.* TOWN COUNCIL OF WESTERLY.

(*Supreme Court of Rhode Island, Dec. 12, 1900.*)

[47 Atl. Rep. 691.]

Street Railroad—Order of Town Council—Change of Rails—Appeal.—Under Gen. Laws, c. 248, § 1, providing that any person aggrieved by any town council's order may appeal within 40 days, where a street-railway company's charter confers on the council, without provision for appeal, the right to fix the conditions under which it can operate a railway in a town, such company cannot appeal from the council's order to change rails on a certain street, since such section only fixes a limitation within which such right, otherwise given, must be exercised.

Same—Same—Same—Impairing Obligation of Contract.*—Where a street-railway company's charter authorizes it to operate its road in such streets as shall be determined by the town council with the company's assent, and on compliance with such conditions and under such regulations as the council shall impose, an ordinance permitting the company to use certain streets, and prescribing the use of a certain kind of rails, is not such a contract as precludes the council from subsequently changing the rails so as to conform to the street paving without the company's assent, since the regulations which the council may impose are not limited to the time when the road is built.

*See 2 Rap. & Mack's Dig. 682, § 25; *note*, 4 Mun. Corp. Cas. 272.

Bill by the Pawcatuck Valley Street-Railway Company against the town council of Westerly. Demurrer to the bill sustained.

John W. Sweeney and Solomon Lucas, for complainant.
A. B. Crafts, for defendant.

STINESS, C. J. The demurrer to the bill is based upon two grounds: First, that the complainant had no right of appeal from the ordinance of the town council passed September 25, 1900, which ordered the change of rails in Main street from T rails to grooved rails in order to fit the block pavement about to be put down. The complainant bases its right of appeal on Gen. Laws, c. 248, § 1, which provides that any person aggrieved by any order or decree of any town council may appeal within 40 days, etc. As stated in Walsh v. Town Council, 18 R. I. 88, 25 Atl. 849, this section was not intended to confer a general right of appeal from every order, but merely to fix a limitation of time within which such right, otherwise given, must be exercised. To the same effect, see Brown v. Narragansett Dist., 21 R. I. 503, 44 Atl. 932.

The words, "unless provision be made to the contrary," added, in the consolidation of sections, in the judiciary act of 1893, did not extend the statute so as to give a right of appeal in all cases where an appeal was not prohibited, as argued by the complainant, but they simply saved a conflict in cases where a different time was provided, e. g. one year in case of nonresident witnesses to a will, and sixty days after filing report in highway cases under the "Betterment Act."

By the charter of the company, the conditions under which it can operate a railway in a town are to be fixed by the town council. No appeal is provided for in the charter, and, in view of its terms, it is evident that none was intended to be given. It would be absurd to suppose that an appeal, with a consequent trial by jury, was to be given to every order specifying a street to be used, the location of poles, provision for gutters and culverts, and the like. Such regulations are simply administrative, and so are placed solely in the discretion of the town council. The order of the town council with reference to paving, and the kind of rail to be adapted to it, is of the same character. If the town council has the authority to pass upon the matter, its action is not subject to an appeal. So far as the bill relates to an appeal pending which an injunction is prayed, it states no case.

The bill, however, denies the power of the town council to pass upon the matter at all, because, according to the charter, the company was to have the right to operate its road in such streets as shall be determined by the town council, with the assent of the company, "and upon compliance with such terms and conditions, and under such rules and regulations, as the town council may impose." In May, 1894, the town passed an ordinance permitting the company to use certain

streets for electric cars, and, among other things, it prescribed the use of a T rail. The bill assumes that the passage of said ordinance and the assent of the company constituted a contract, which cannot be changed without the further assent of the company. We make no question that an ordinance granting a franchise on conditions, and the acceptance thereof, and the building of a railroad thereunder, amounts to a contract. But the grant of a right to use the streets is one thing, and the surrender of control of a part of such streets by the town is quite a different matter. It may readily be conceded that a town cannot, outside of such a contract, impose new terms and conditions, which would practically destroy either the grant or its value. Such was the case of Citizens' St. Ry. Co. v. City R. Co. (C. C.) 56 Fed. 746, affirmed in 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, where the value of the line would be greatly impaired by the grant to another company. See, also, People v. Chicago W. D. Ry. Co., 118 Ill. 113, 7 N. E. 116; Mayor, etc., of City of Houston v. Houston City St. Ry. Co., 83 Tex. 548, 19 S. W. 127. In Western Paving & Supply Co. v. Citizens' St. Ry. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, it was held that a city could not compel a company to pay a proportionate part of the cost of improving a street beyond what it was to pay under the contract. The opinion held, however, that doubtful rights were to be construed against the company, and in favor of the city.

Such cases are quite different in principle from the case before us. Under our statute, towns are required to keep their highways safe and convenient for travelers. Under this duty, which a town cannot evade, there must be a sufficient control of the whole highway by the town to enable it to perform its duty. Such necessary and reasonable requirements as may be made to this end are materially different from new requirements which are made simply for the benefit of the town, and from those which nullify or seriously impair the rights of the company. In Mayor, etc., of City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160, where the act granted the right to regulate the use of streets by railway companies, the court added: "In the absence of any such positive legislation, we think there could be no well-founded doubt of this power, and that any contract entered into by the city with a railroad company would be subject to its exercise, so long as it did not materially modify or impair the rights granted by the contract." Numerous cases hold that the test of legality of an ordinance, making some new requirement deemed necessary for the safety, health, or welfare of the community, is its reasonableness and necessity. Upon this ground, courts have the right and duty of review in order to protect rights and to avert oppression. See Des Moines City Ry. Co. v. City of Des Moines (Iowa) 1 Am. & Eng. R. Cas. 215, and note (s. c. 58 N. W. 906); Cape May,

D. B. & S. R. R. Co. v. City of Cape May, 59 N. J. Law, 397, 36 Atl. 696; Wabash R. Co. v. City of Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87; Bangs v. Railroad Co., 89 Me. 194, 36 Atl. 73; City of Burlington v. Burlington St. Ry. Co., 49 Iowa, 144.

In the bill before us there is no allegation that the proposed change of rail is either unnecessary or unreasonable. The complainant stands simply on what it claims is an executed contract. It assumes that nothing more can be done without its consent. If its position with regard to the contract was correct, we think it would still be subject to reasonable and necessary requirements, under the authorities cited above. But an inspection of its charter, appended to the bill, shows that the restriction of assent, upon which it relies, is not as broad as its claim. The language of the charter is: "Upon such streets * * * as shall be from time to time fixed and determined by the town council, * * * with the assent of said corporation in writing expressed and filed with the town clerks of said towns, and upon compliance with such terms and conditions and under such rules and regulations as said town councils may impose." It will be observed that the assent of the company relates only to the streets through which it shall go. The terms and regulations require no such assent. They are not limited to the time when the road is built, for the obvious reason that experience may show the necessity of reasonable modifications. Under these facts, it is difficult to evolve such a contract as the complainant sets up. But there is a further provision in the charter. Under section 4, the town council, at any time after a year from the opening of the road, which time has elapsed, "may by vote determine as to said track * * * that the same or part thereof be discontinued, and thereupon the location shall be deemed resolved, and such portion of the tracks and rails of said corporation shall forthwith be taken up," etc. Surely, if the town has the right to remove the rails altogether, it may make the milder requirement of ordering a change of rail in a street, on the ground of safety and convenience. The bill states no case, and the demurrer is sustained.

In re TOBIN.

(*Court of Appeals of New York, Nov. 20, 1900.*)

[58 N. E. Rep. 650.]

City Fire Department—Relief Fund*—Contributions.—A city charter (Laws 1888, c. 583, tit. 13, § 15, as amended by Laws 1889, c. 153) providing that there shall be deducted from the monthly pay of each officer and fireman of the fire department, and from that of the other employees of said department as shall so desire, and from the monthly pension of such retired members of the department who had contributed to

*See notes at end of case.

said fund before retirement, the monthly sum of $1, which, with other moneys, shall be known as the "Widows' and Orphans' Relief Fund," and, in case of death of a member or employee of said department in its service, or retired pensioner, so contributing, there shall be paid a certain sum to his widow. *Held*, that in the case of a member of the fire department who retired after the creation of the fund, and therefore had contributed to it, the trustees of the fund should have deducted one dollar from his monthly pension for it, notwithstanding his unwillingness to be thus assessed, and that, though it was not deducted, his widow was, on his death, entitled to be paid from the fund.

Appeal from supreme court, appellate division, Second department.

In the matter of the application of Margaret Tobin, relatrix, for a peremptory writ of mandamus directed against John J. Scannell, as fire commissioner of the city of New York, requiring him to pay to relatrix a pension. From an order of the appellate division (66 N. Y. Supp. 97) reversing an order of the special term denying the writ, said Scannell appeals. Affirmed.

John Tobin, the husband of the relatrix, was a fireman in the fire department of Brooklyn for ten years prior to November 1, 1895, when he was retired upon a pension. He died about four months afterwards. During his membership he had contributed to the widows' and orphans' relief fund. Upon his retirement he requested his name to be taken from the list of subscribers to that fund. He assigned as a reason that his relations with his wife were not satisfactory. His name was accordingly taken from the list, and he thereafter contributed nothing. The charter of the city of Brooklyn contained provisions, substantially re-enacted in the charter of Greater New York, providing for two funds,—one a fireman's insurance fund, made up of fines, rewards, fees, donations, and the percentage or tax on foreign insurance companies. From this fund Tobin received his pension. The other was the widows' and orphans' relief fund, from which the relatrix, the widow of Tobin, claims a pension. The administration of both funds is now committed to the respondent, the fire commissioner of the city of New York, without change as to the rights of persons claiming benefits therefrom. Laws 1897, c. 378, § 791. The respondent refused to allow the relatrix a pension, because her husband had voluntarily ceased to be a contributor to the fund for that purpose. The charter of the city of Brooklyn (Laws 1888, c. 583, tit. 13, § 15, as amended by chapter 153, Laws 1889) provided, among other things, as follows: "There shall be deducted by the comptroller of the city of Brooklyn, from the monthly pay of each officer and fireman of said department, and from that of the other employees of said department, as shall desire to avail themselves of this provision, and by the trustese of the fireman's insurance fund from the monthly pension of such retired members of the department who had contributed to said fund before retirement, the monthly sum of one dollar,

which shall be received and held by the trustees of the insurance fund herein created, in the like manner as the other moneys herein provided to be paid to them, and which shall be known as the Brooklyn fire department widows' and orphans' relief fund; and in case of the death of any member or employee of said department in the service thereof, or retired pensioner, so contributing, there shall be paid to the widow or legal representative of such deceased member or employee or retired pensioner, the sum of one thousand dollars out of the money so assessed; and in the case by reason of the number of deaths, the aggregate amount of the money so provided to be assessed and collected should prove inadequate to make such payment, then the assessment may, in the discretion of the trustees, be increased to not exceed the sum of two dollars in such month's pay. The said commissioner of the fire department of the city of Brooklyn may direct the trustees of the Brooklyn fire department widows' and orphans' relief fund to pay from said fund to the widow of any deceased retired pensioner of said fire department who had contributed to the said fund previous to his said retirement, and who, by reason of said retirement, was debarred from further contributing to or receiving any of the benefits of said fund, such sum of money as the widow of said retired pensioner would have been entitled to receive if said retired pensioner had not been retired from said fire department at the time of his death."

John Whalen, Corp. Counsel (William J. Carr, of counsel), for appellant.

Eugene V. Brewster, for respondent.

LANDON, J. (after stating the facts). In determining whether the deduction of one dollar from the monthly pay of a fireman, and from the monthly pension of the retired members of the department who had contributed to the widows' and orphans' relief fund before retirement, was voluntary or compulsory, it is proper to notice: (1) The widows' and orphans' relief fund was derived from the deductions from the monthly pay of officers and firemen of the department, and of other employees of the department who should desire to avail themselves of its benefits, and also from the monthy pensions of such retired members of the department as had contributed to said fund before retirement. (2) The firemen's insurance fund was derived from other sources. (3) A member of the department, such as was the relatrix's husband while in the uniformed force, who, after serving 10 years, became disabled, was entitled to his discharge, and could be awarded a pension from the firemen's insurance fund. (4) Under the Brooklyn charter, and as is apparent from the provisions above quoted, an employee was not a member of the fire department, and therefore could receive no pension from the firemen's insurance fund. (5) The distinction between retired members who had contributed to the widows' and orphans' relief fund

Notes

before retirement and those who had not so contributed was, no doubt, made because at the time of the original enactment for the establishment of the fund the members who had already retired had not contributed anything to the fund, and could not have done so. Thus the distinction was due to the situation, and not to the intention to confer an option. This fact explains the meaning of the words "so contributing" in the provision: "In case of the death of any member or employee of said department in the service thereof, or retired pensioner so contributing, there shall be paid to the widow or legal representative of such deceased member or employee or retired pensioner the sum of one thousand dollars so assessed." It is thus obvious that the option of contribution was limited to employees, and that as to members the contribution was in fact an assessment; that, as the relatrix's husband was a member for years after the enactment of the provision respecting the widows' and orphans' relief fund, he could not fall within the class of members retired before its enactment, and therefore not within the non-contributing class. He was in fact a contributing member during his active service, and after his retirement the trustees of the firemen's insurance fund should, under the mandate of the statute, have deducted one dollar from his monthly pension for the benefit of the relief fund, notwithstanding his unwillingness to be thus assessed. The order should be affirmed, with costs.

O'BRIEN, HAIGHT, MARTIN, and VANN, JJ., concur. PARKER, C. J., and BARTLETT, J., not voting.

Order affirmed.

NOTES.

Police and Fire Relief Funds—Associations—Pensions.—The subjects of pensions to policemen and firemen, the organization of relief associations, and the control and disbursement of "benefit funds" are so entirely statutory that care must be exercised in taking any authority cited in this note as being of general application.

I. WHO MAY CLAIM BENEFIT AND WHEN.

Pension—Not Allowed to Discharged Firemen (89 Ohio Laws 259, § 17).—Although a fireman may have sustained permanent injury while in the discharge of his duty, yet if after the time of receiving such injury, and before the time of his making application for a pension, he has been discharged, the application must be denied. If he has been wrongfully discharged he must be reinstated before applying. Karb *v.* State (Ohio), 43 N. E. Rep. 920.

Same—Allowance—Mandamus (89 Ohio Laws 259, § 17).—In Karb *v.* State (Ohio), 43 N. E. Rep. 920, it was held that the mayor and other officials constituting the board of trustees for the distribution of the firemen's pension fund could be compelled by mandamus to examine an injured fireman and determine whether he was a member of the fire department, and if so, whether his disability was incurred while in the discharge of his duty; or, having made such examination, and determined in favor of the applicant, a mandamus would lie to compel his examination by the proper medical officer to determine the extent of his injuries. And if upon such examination the applicant be found to be permanently injured, partially or totally, the fire chief, fire marshal, and chief engineer have power, in their discretion, to relieve

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such applicant from service at fires; and if they do so relieve him, a mandamus will then lie to compel the mayor and others composing the board of trustees of the fund to place the applicant upon the pension list.

Same—Discretion of Police Board.—Chapter 364 of the Laws of 1885, providing for the retirement upon pension of members of the police force who have served for twenty years, is not mandatory upon the board of police commissioners, but leaves it to their sound discretion as to whether any policeman shall be so retired or not. People *ex rel.* Brady *v.* Martin *et al.*, 39 N. E. Rep. 960, 145 N. Y. 253.

Right to Pension as Affecting Right to Sue for Injury.—In Coots *v.* The City of Detroit, 5 L. R. A. 315, it was held that the driver of a fire engine, who was injured by the wheel of his engine dropping into an excavation which the city had negligently left open, was not precluded from maintaining an action against the city by reason of the fact that he was entitled to be retired upon a pension because of such injury. In this case, however, the fireman was not entitled to a pension absolutely, but the granting or denying thereof was within the discretion of the fire commission. Whether he would be forced to elect between his right to recover for the injury and his right to the pension, in case his right to the latter were absolute, was, of course, not decided.

Relief Fund—Injured Substitute.—Under statute, 86 Ohio Laws, p. 149, one who is injured in the discharge of his duty while acting as substitute for a fireman temporarily absent is not entitled to a pension. State *v.* Trustees Firemen's Pension Fund, 18 Ohio Cir. Ct. Rep. 887.

Same—Death from Natural Causes.—The widow of one dying from injuries received in a railway wreck is not entitled to receive a benefit under California Act, March 4, 1889, § 7, providing an insurance fund for families of policemen who die from natural causes. Slevin *v.* Police Pension Fund Com'rs, 123 Cal. 130, 44 L. R. A. 114, 55 Pac. Rep. 785.

Same—Family May Claim Benefit, When.—Where each member of the force contributes a certain percentage of his salary to the fund, from which, under the rules, no benefit is to be paid until the fund shall have reached the sum of $8,000.00, the family of a member who died before that amount had been reached are not excluded from the benefit therein, but are entitled to be paid as soon as the $8,000.00 mark is reached. Miller *v.* Hamilton Police Ben. Fund, 28 Can. S. C. 475.

Same—Interest of Living Policeman in Fund.—A statute which directs that $2.00 per month be retained out of the salary of each policeman for the purpose of creating a fund to be known as the Police Life and Health Ins. Fund, out of which $1,000.00 was to be paid to the personal representative of any member of the force upon his death, does not give a policeman any interest, more than a mere expectancy, in such fund until his death; and until that event the state may destroy it or divert it to any purpose it may see fit. Pennie *v.* Reis, 132 U. S. 464, 10 Sup. Ct. Rep. 149, affirming 22 Pac. Rep. 176, 80 Cal. 266. See also, Clarke *v.* Reis, 87 Cal. 543, 25 Pac. Rep. 759; Clarke *v.* Police Life & H. Ins. Bd., 123 Cal. 24, 55 Pac. Rep. 576.

II. RELIEF FUND EXEMPT FROM TAXATION.

Under act of March 25, 1885 (2 Gen. St. p. 1494), all the property, real and personal, of a firemen's relief association is exempt from all taxation, even though the funds be largely in excess of any demands likely to be made upon them. This exemption includes a mortgage upon lands, the funds of the association having been so invested in order that the interest so obtained might be applied to the purposes for which the association was organized. State (Long Branch Firemen's Relief Ass'n) *v.* Johnson, Tax Collector, 62 N. J. L. 625, 43 Atl. Rep. 573.

III. CONSTITUTIONAL LAW.

Police Pension—Retirement on Half Pay.—A statute which provides that the board of police commissioners may in their discretion retire any member of the department on half pay, contravenes art. 4, § 7, of

the Missouri constitution, prohibiting the legislature from authorizing any city to appropriate money in aid of any individual. State, Heaven, *v.* Ziegenhein, 144 Mo. 283, 45 S. W. Rep. 1099.

Same—Appropriation to Pension Association.—The appropriation of $10,000.00 by the city of Philadelphia for the use and benefit of a private corporation known as the Philadelphia Police Pension Fund Association, having for its object the pensioning of disabled and aged policemen, and the widows and orphans of deceased policemen, is not a violation of a constitutional provision which provides: "The General Assembly shall not authorize any county, city, borough, township, or unincorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual." Commonwealth *v.* Walton, 182 Pa. St. 373, 61 Am. St. Rep. 712.

Firemen's Benevolent Fund—Statute Creating Unconstitutional.—The exempt "firemen's benevolent fund" act, N. Y. Laws 1896, chap. 141, is unconstitutional in that it is a special city law, relating to the affairs of a certain city, which does not show on its face that it was submitted to such city for its acceptance or rejection as required by art. 12, § 2 of the New York constitution. Exempt Firemen's Ass'n *v.* Exempt Firemen's Benevolent Fund, 34 App. Div. 138, 54 N. Y. Supp. 621.

Taxation of Insurance Companies for the Benefit of Relief Funds.—That a state may levy a tax upon the profits of a foreign insurance company for the purpose of creating or enlarging relief funds for firemen, has been denied in some jurisdictions as being unconstitutional, for the reason that it is not placing the burden upon all citizens alike. But since corporations are not persons for many purposes under the law, a state having the power to altogether exclude foreign corporations of certain classes from doing business within its borders, or to admit them under restrictions and conditions, the better view is that such taxation is constitutional. Fire Association of Philadelphia *v.* New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108; People *v.* Fire Association of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Philadelphia Association for Relief of Disabled Firemen *v.* Wood, 39 Pa. 73; Firemen's Benevolent Association *v.* Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Trustees of Exempt Firemen's Fund *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 217.

That such a tax is unconstitutional, see Henderson *v.* London & Lancashire Ins. Co., 135 Ind. 23, 41 Am. St. Rep. 410, 20 L. R. A. 827; San Francisco *v.* Liverpool, L. & G. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. Rep. 380; Liverpool, L. & G. Ins. Co. *et al. v.* Clunie, 88 Fed. Rep. 160.

But a license fee of two hundred dollars, imposed upon all insurance companies, both foreign and domestic, doing business in a certain city, for the purpose of creating a fund to enable the fire department of that city to reward superior skill and exertion in the members, and to provide for those who may become sick or disabled in the discharge of their duties as firemen, or their families, is not unconstitutional. Phœnix Assurance Co. *v.* Montgomery Fire Department (Ala.), 42 L. R. A. 468.

SAVANNAH, T. & I. H. RY. OF SAVANNAH *v.* MAYOR, ETC., OF SAVANNAH.

(*Supreme Court of Georgia, Nov. 26, 1900.*)

[37 S. E. Rep. 393.]

Occupation Tax*—Use of City Streets—Liability of Street-Car Company.—The municipal authorities of the city of Savannah had power, under the charter of the city and the second proviso of section 2180 of

*See City of Springfield *v.* Smith, 37 L. R. A. 446; Denver City R. Co. *v.* City of Denver, 29 L. R. A. 608; City of San Bernardino *v.* So. Pacific Co. (Cal.), 29 L. R. A. 327; *note*, 1 Mun. Corp. Cas. 622.

Savannah, etc., Ry. *v.* Mayor, etc., of Savannah

the Civil Code, to levy and collect an occupation or business tax from street-railroad companies for the use and occupation of the city streets by their tracks and cars, when such companies' principal business was the transportation of passengers from points within the city limits to other like points. (a) The facts of this case differ from those of the case of City Council of Augusta *v.* Central Railroad, 78 Ga. 119.
(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Petition by the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., against the mayor and aldermen of the city of Savannah. Judgment for defendants, and plaintiff brings error. Affirmed.

Barrow & Barrow and Jos. B. Cumming, for plaintiff in error.

Saml. B. Adams, for defendants in error.

SIMMONS, C. J. The municipal authorities of the city of Savannah, by a proper ordinance, levied a business or privilege tax upon street-railroad companies doing business within the limits of the city. The plaintiff below, being such a company, filed an equitable petition against the municipal authorities, alleging that the city had no power or authority to levy such taxes, and that the same were therefore illegal and void. Upon the hearing the judge refused the injunction, and the petitioner excepted.

The charter of the city of Savannah contains the following clause: "They [the municipal authorities] are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said city, * * * and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said city, and may enforce the payment of such assessments and taxes in such manner as said mayor and aldermen may prescribe." Code 1882, § 4847. This is about as broad a power as the English language can express to tax businesses and occupations. There can be no doubt of the intention of the legislature to confer this power, and there can be no doubt that the city authorities had the power to impose the tax here complained of, unless the decision in the case of City Council of Augusta v. Central Railroad, 78 Ga. 119, rules to the contrary. It is claimed by the plaintiff in error that as street railroads were, by the act of 1889 (Acts 1889, p. 36), put under the same tax act as steam and commercial railroads, they are brought within the construction put upon the tax act of 1874 in the Augusta Case. It is claimed that, under that case, the municipal authorities had no power to levy or collect an occupation tax upon street-railroad companies; that the charter of the city of Augusta contained substantially the same provisions as to the taxation of occupations as does that of the city of Savannah; and that, when this court decided that the municipal

authorities of Augusta had no authority to levy a business tax upon the Central Railroad and the other two railroad companies involved in that case, the question was closed so far as concerns the right of the city to impose an occupation tax upon the railroad company. We do not agree with this contention. The opinion in the Augusta Case, which is the decision of the court, shows that the ruling made applied only to what may be termed a "commercial railroad company,"—one whose general business is not carried on within the city. The state, by the act of 1874, reserved the exclusive right to collect taxes from railroad companies on the property owned and used in connection with their business, and a city had no authority to impose a tax upon such property. Nor could a city, under the case just cited, impose a business or occupation tax on a railroad company which under authority of its charter merely transported freight and passengers to and from the city; for such a tax could be used to work a practical repeal of the charter of the company. Where, however, a street-railroad company does not transport freight or passengers to and from the city as the beginning or end of the route, but engages in transportation from one point within the city to another point within the city, it enters into a general business within the city, and is properly taxable by the municipality. And so, if a street-railroad company combine the two businesses, as was done by the company in the present case, so as to transport freight or passengers from the city to points beyond, or from such points to a point within the city, and also to transport freight or passengers from one part of the city to another, then such company, though it might not be subject to a city tax on its extramunicipal business, may be taxed by the city on the business carried on exclusively within the city limits. This principle was recognized in the Augusta Case, for it is there stated that "if a railroad company, which is a corporation, should carry on a business in the city of Augusta such as warehouseman, broker, drayage, or commission business, etc., it would be liable to be taxed as any other person carrying on a like business." It is argued that one of the railroad companies declared in the Augusta Case to be exempt had in this state but one or two miles of track, nearly all of which lay within the city of Augusta. Conceding this to be true, the case is still vastly different from the present one; for the company in question was engaged in transportation to and from Augusta and points in an adjoining state, and did not enter into the business of transporting freight or passengers from any point within Augusta's limits to any other such points.

In the present case the record discloses that the street-railroad company actually occupies with its cars and tracks the streets of the city of Savannah, and that it transports passengers from point to point within the city, and charges toll therefor. It occupies and uses the streets as much as any

hack or omnibus line would do,—indeed, much more. It is well settled that the city has authority to charge these latter companies for the privilege of carrying on their businesses within its limits, and we see no reason why a street-railroad company should be held to stand upon a different footing. It was argued by counsel for the plaintiff in error that, while the power given the city to tax occupations was very broad, it was not universal; that, inasmuch as the state itself had never levied a business tax upon railroad companies, it was not the intention, in granting the charter of the city of Savannah, to give the city authorities power to levy such a tax. In reply to this argument, it is sufficient to say that there are a great many businesses and occupations upon which the state has never levied a business tax, but which are nevertheless taxable by cities. Thus, the state has never levied a business tax upon merchants, blacksmiths, those who run omnibus or hack lines, or those in various other occupations which might be mentioned; yet, under the authority given to municipalities to impose occupation taxes, such taxes have been generally, we might almost say universally, levied upon all businesses within the municipal limits. While the taxation of street-railroad companies may not have been in the mind of the legislature when it granted to the city of Savannah "full power and authority to make such assessments and lay such taxes on the inhabitants of said city * * * and those who transact or offer to transact business therein," the power granted is amply sufficient to cover such taxation. We supposed that when this charter was granted to the city of Savannah there were no such companies in this country as the present plaintiff in error, but the power given is sufficient to embrace any new business or occupation that might arise in the rapid commercial and business growth of the country.

Admitting, for the sake of the argument, the soundness of the plaintiff's contention as to the force and effect of the Augusta Case (78 Ga. 119), we would still hold that, under the act of 1894 (now section 2180 of the Civil Code), the city authorities had power to levy an occupation or privilege tax upon this plaintiff in error. The record discloses that the company was incorporated under the act just cited. In the act and in the Code section is a proviso which declares that all street-railroad companies incorporated thereunder "shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time." As before remarked, the charter of the city gives it ample power to levy and collect a tax upon the business of street-railroad companies. The tax is therefore within the terms "assessments and other lawful burdens" imposed upon them. In the case of Home Ins. Co. of New York v. City Council of Augusta, 50 Ga. 530, this court, in discussing a provision of the charter of the city of Augusta which

authorized the municipality "to make such assessments on the inhabitants of Augusta or those who hold taxable property within the same as may seem expedient," said: "What is the meaning of the words 'assessments on the inhabitants'? It certainly authorizes a tax on property. Is it limited to that? If so, why? Businesses, occupations, and professions are as equally the subject of taxation as property, and have been as regularly taxed as any real or personal property. Cooley, Const. Lim. 479. If the 'assessment' is not limited to the person, such as a capitation or poll tax, what is there to confine it to any one subject-matter of taxation? It has always been the rule of the legislature of this state to assess a tax on property, on business, and also a capitation tax; and, when taxation is referred to, the power to 'make assessments' includes the power to assess all three, unless there be some other provision to limit it. If it does not extend to the power to levy a tax on business, etc., then it would, in this case, be restricted altogether to property." See, also, Wells v. City of Savannah, 107 Ga. 4, 32 S. E. 669; Mutual Reserve Fund Life Ass'n v. City Council of Augusta, 109 Ga. 73, 35 S. E. 71. For these reasons, we think that when the legislature extended to street railroads the method of taxation which had theretofore been applied to commercial railroads, and at a time subsequent to that of the decision in the Augusta Case inserted the above-quoted proviso as to liability to assessments and other lawful burdens, this was a modification of that decision, or a refusal to extend it to street railroads, even if the decision could otherwise be held to embrace them. After much reflection and study of this important case, we have come to the conclusion that there was no error in holding that street-railroad companies are liable under the law for the business tax imposed by the city, and that there was no error in refusing the injunction. Judgment affirmed. All the justices concurring.

PEOPLE *ex rel.* O'MEARA *v.* CITY COUNCIL OF SALT LAKE CITY.

(*Supreme Court of Utah, Dec. 11, 1900.*)

[64 Pac. Rep. 460.]

Construing Legislative Enactment.—In construing a legislative enactment, under a familiar principle of statutory construction every doubt as to the validity of the enactment must be resolved in favor of the statute.

Bond Issue—Legislative Authority—Constitutional Limit.*—The legislature has the inherent power to authorize a municipality to issue bonds for its indebtedness. Const. art. 14, § 4, limits, but does not confer, such power.

Presumption of Law—Legislative Knowledge of Current History.—The framers of the fundamental law of this state must be presumed to have had knowledge of the fact, because a matter of current history.

*See *note* to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 728.

that many municipalities of the proposed state were already indebted in excess of the 4 per cent. limit mentioned in section 4, art. 14, Const., and yet had an entirely inadequate supply of water, light, and sewer facilities.

Interpretation of Constitutional Provision.—Constitutions are not to be interpreted alone by their words abstractly considered, but by their words read in the light of the conditions and necessities in which the provisions originated, and in view of the purposes sought to be attained and secured.

Same.—Under the provisions of section 4, art. 14, Const., the two limited debt-creating powers of municipalities therein mentioned are separate and independent. The special limited power to incur an indebtedness for water, light, and sewer purposes is absolute within its own limits, and a debt created by virtue thereof is additional to that restricted and limited for general purposes, and fully authorized thereby and by section 308, Rev. St. 1898.

(Syllabus by the Court.)

Application by the people, on the relation of W. P. O'Meara, for a writ of prohibition to the city council of Salt Lake City. Denied.

A. L. Hoppaugh, for plaintiff.

F. B. Stephens, for defendant.

BARTCH, C. J. This is an original proceeding in this court to obtain a writ of prohibition to prevent the city council of Salt Lake City from issuing certain city bonds and creating an indebtedness for the purpose of supplying the city with water. The petitioner, in his affidavit, represents that the council is about to issue a series of 250 bonds of the aggregate sum of $250,000, for the purpose of increasing the water supply and improving the water works of the city, pursuant to sections 308–310, Rev. St. 1898, which provide for the submission of the incurring of a bonded indebtedness to such qualified electors as have paid a property tax in the preceding year; that on July 16, 1900, an election was held pursuant to statute, and the question of incurring the indebtedness submitted to such electors; that a majority of the electors voted in favor of issuing the bonds; that thereafter the city council, by ordinance of September 24, 1900, provided for the issuing of the bonds, and threatens and intends to issue the same and incur the indebtedness, unless restrained and prohibited from so doing by this court; that such threatened action of the council is in violation of section 4, art. 14, of the constitution of this state, which the petitioner claims limits the total indebtedness of the city to 4 per cent. of the assessed valuation of taxable property within its limits for general purposes, and provides for 4 per cent. additional for supplying the city with water, etc.; that the value of the taxable property in the city is $31,950,210: that the present total indebtedness, added to that threatened and intended to be created by the issuing of said bonds, will exceed 8 per cent. of the value of the taxable property; and that, because of such excess, the issuing of the bonds would be in violation of the above-mentioned provisions of the constitution. The petitioner further represents that the said election, upon which the validity of the proceedings of

the city council depends, is wholly void, because no legal polling places were established, nor any canvass of the result of the election lawfully made. Upon filing this affidavit, an alternative writ of prohibition was issued. At the hearing the defendant filed a demurrer to the petition on the ground that it failed to state a cause of action, and after argument the matter was submitted upon demurrer.

The action, it appears, was brought to test the validity of the bond. Upon argument, counsel for the plaintiff admitted that the objection to the conduct of the election relating to the establishment of polling places and the canvass of the result was not well taken. Therefore the sole question to be determined is whether, under section 4, art. 14, Const., the entire debt of the city for all purposes is limited to 8 per cent. of the value of the taxable property, or whether a separate power is granted to incur debts for water, light, and sewer purposes, not exceeding 4 per cent. of the assessed valuation, independent and regardless of the amount of the general indebtedness. That section, so far as material here, reads: "No city, town, school district or other municipal corporation shall become indebted to an amount, including existing indebtedness, exceeding four per centum of the value of the taxable property therein, the valuation to be ascertained by the last assessment for state and county purposes, previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: * * * provided, further, that any city or town, when authorized as provided in section three of this article, may be allowed to incur a larger indebtedness, not exceeding four per centum additional, for supplying such city or town with water, artificial lights or sewers, when the works for supplying such water, light and sewers shall be owned and controlled by the municipality." Counsel for the plaintiff insist that the framers of the constitution intended by this section to prescribe a limitation beyond which no city could go in its expenditures for any purpose, and that, when the several provisions thereof are construed together, it is manifest that the intention was to limit the entire indebtedness of a city to 8 per cent. of the value of the taxable property. Just what the constitution makers intended, or just what they meant by the language employed, is probably not altogether free from doubt. The legislature, recently after the adoption of the constitution, directly contrary to the contention of the petitioner, interpreted section 4 as conferring power, through proper legislation, upon municipalities to incur debts for water, light, and sewer purposes in any sum not to exceed 4 per cent. of the valuation of the taxable property, independently of the power to incur debts for other purposes. This is apparent from the several legislative enactments dependent upon this section of the constitution, among which is section 308, Rev. St. 1898, providing, as follows: "Any

city or town in this state is hereby authorized to incur an indebtedness not exceeding four per cent. of the value of the taxable property therein, for the purpose of supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality, when the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax in the year preceding such election and a majority of those voting thereon shall have voted in favor of incurring such debt." Was this affirmative interpretation of section 4, art. 14, Const., by the legislature, correct? If not, then its enactments resulting therefrom are void, and must be declared so. Before this can be done, however, under a familiar principle of construction, every doubt as to the validity of the enactment must be resolved in favor of the statute, and in considering the constitution and statute with reference to the subject before us we must not be unmindful of the fact that the legislature has the inherent power to authorize a municipality to issue bonds for its indebtedness. The constitution limits, but does not confer, the power. The legislature, therefore, having expressly authorized the municipality to incur an indebtedness for water, light, and sewer purposes to the extent of 4 per cent. of the valuation of the taxable property, independent of debts for general purposes, that power exists in the municipality, unless there is an affirmative restriction in the constitution upon the power of the legislature to confer it.

It is urged that such a restriction is contained in section 4, article 14, of that instrument, and that it is in its nature a general restriction, with a special extension of restricted power. The principal clause of the constitutional provision in question constitutes a limitation or restriction upon the power of any municipality to "become indebted to an amount, including existing indebtedness, exceeding four per centum of the value of the taxable property therein." This is a general restriction upon the debt-creating power, and deprives the legislature of its inherent power to authorize the municipality to incur any indebtedness beyond the 4 per cent; and if the framers of the constitution had stopped there, and made no further provisions upon this subject, then there would be no difficulty of construction, because it would be apparent that the 4 per cent. limit would include all debts, those existing as well as those to be created. Those who framed the fundamental law, however, were confronted with the conditions and necessities of growing cities, and must be presumed to have had knowledge of the fact, because a matter of current history, that some of them already had existing debts in amount largely in excess of the 4 per cent. limit, and yet had an entirely inadequate supply of water, light, and sewer facilities. Such was the case of the chief municipality of the proposed state,

and it, under the general restriction, would have been wholly unable to provide for acquiring water, light, and sewers adequate to its growing necessities. Doubtless, considering these conditions and facts, and possibly influenced thereby in a considerable degree, they added the clause, in the shape of a proviso, that any city or town "may be allowed to incur a larger indebtedness, not exceeding four per centum additional, for supplying such city or town with water, artificial lights or sewers, when the works for supplying such water, light and sewers shall be owned and controlled by the municipality." This, in effect, is the grant of a limited power for these special purposes, which the general restriction had taken away; and, were it not for the terms "larger" and "additional," it would be quite clear that an absolute power, within its own limits, and independent of the restriction as to general debts, was intended. While these words, viewed abstractly, may render the real meaning of the clause somewhat obscure, still, when considered with reference to the conditions prevailing when the instrument was drafted, the purpose of the proviso can hardly be mistaken. In interpreting these words and ascertaining their meaning as used, it becomes important to consider, in the light of the conditions and growing necessities of the municipalities, the scope and purpose of the entire provision. "Constitutions are not to be interpreted alone by their words abstractly considered, but by their words read in the light of the conditions and necessities in which the provisions originated, and in view of the purposes sought to be attained and secured." Dill. Mun. Corp. § 3a. Section 4 was drafted both for present and future operation; primarily for future operation. This is true both as to the general indebtedness and the special. Viewed in the light of the conditions existing when the constitution was framed, these words "larger" and "additional" form a clear expression of the natural operation of the section. As we have seen, the principal clause refers to the power to incur general indebtedness, and limits that power to 4 per cent. of the valuation of the taxable property, including the existing indebtedness, and the words "larger" and "additional" simply mean that, in addition to and irrespective of the general indebtedness, including that existing, to which the debt-creating power is restricted by virtue of the principal clause, an indebtedness for the special purposes enumerated in the proviso may be incurred up to 4 per cent. of the value of the taxable property in the municipality. Whatever may have been the motive for this grant of limited power for these special purposes, it seems clear that in their choice of words to express it the framers of the constitution, confronted with the existing conditi ns of the municipalities, had in view the permanent and prospective operation of the section, and doubtless their chief purpose was to restrict the inherent power of the legislature to authorize the incurring of debts in any amount, and to

separate the general debt power from the special debt power. The meaning of the terms employed must be judged by the purpose for which they were used. The expression, "larger indebtedness, not exceeding four per centum additional," was thus evidently intended to refer to the general indebtedness as such, and the effect of the language used in the whole section is to restrict, and in some cases, by "including existing indebtedness," to temporarily suspend, the general limited power, while it grants a special limited power for the special purposes mentioned, which is essential to the health, welfare, and comfort of the people, and is not limited by the phrase "including existing indebtedness." Keeping in mind the facts and conditions referred to, this would seem to be the natural construction of the section. The limited restriction and the restricted grant to create indebtedness are essentially independent and distinct, and the general and special debts which they authorize are separated by their purposes and the separate powers under which they must be incurred. This would clearly be the natural operation and effect of the two 4 per cent. limits, in the absence of any contingency, such as a decrease in the valuation of the taxable property, which would cause the 4 per cent. of the valuation under the general power to be less than the indebtedness. But the happening of such a contingency cannot change the purpose and natural operation of the section, nor affect the special power under which the municipality in this case seeks to act. The constitution of the state of Washington has a section almost identical with the one here under consideration, and the supreme court of that state has construed similar limitations to be separate and distinct. Austin v. City of Seattle, 2 Wash. St. 667, 27 Pac. 557; Seymour v. City of Tacoma, 6 Wash. 427, 33 Pac. 1059; Petros v. City of Vancouver, 13 Wash. 423, 43 Pac. 361; State v. Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Graham v. City of Spokane, 19 Wash. 447, 53 Pac. 714. From these considerations we are of the opinion that under the constitution the two limited powers are essentially separate and independent; that the special limited power to incur an indebtedness for water, light, and sewer purposes is absolute within its own limits; that a debt incurred by virtue thereof is additional to that restricted and limited for general purposes; and that the municipality, in this instance, has both the constitutional and statutory power to issue the bonds referred to in the petition herein. The writ of prohibition must therefore be denied. It is so ordered.

MINER and BASKIN, JJ., concur.

ELLIOTT *et al. v.* CITY OF DETROIT.

(Supreme Court of Michigan, Nov. 2, 1899.)

[84 N. W. Rep. 820.]

Mandamus Proceedings*—Parties—When Granted.—Mandamus to compel the officers of a city to refrain from submitting to the electors of the city propositions to amend the city charter, under a statute providing a method therefor, and from incurring any expense in connection therewith, will be granted on the petition of private individuals without the intervention of the attorney general, where the petitioners are interested as taxpayers, and would be entitled to an injunction on the facts stated, and the question presented is of such immediate and pressing importance that it would be impossible to review it in any other way.

Delegation of Legislative Power—Constitutional Law.—The Eikhoff law (Loc. Acts 1899, No. 452), permitting the city of Detroit to amend its charter, and providing that on the recommendation of the mayor, and by resolution approved by three-fourths of the common council, or by petition of 5,000 qualified electors, said common council shall submit to the electors of the city propositions to effect amendments to the city charter, and providing a method for submitting the same, is contrary to the constitution, because it delegates legislative power resting with the legislature of the state to the local authorities.

Petitions by William H. Elliott and others for writs of mandamus to compel the common council and city clerk of the city of Detroit to refrain from submitting to the electors of the city propositions to amend the city charter, under Loc. Acts 1899, No. 452. The writs were granted, and the defendants removed the causes to the supreme court by certiorari. Affirmed.

The following is the opinion in the court below:

"Petitions in these two cases were filed, asking the court to issue a writ of mandamus commanding the said city of Detroit, and the common council of said city, and the city clerk of said city, to desist and refrain from proceeding further to publish certain notices mentioned in said petitions, and from incurring any expense in the publication thereof, and from paying any expense heretofore incurred in connection with the publication thereof, and also from preparing any ballots in respect to such propositions or proposed amendments to the city charter for use by the electors at the election to be held in November next, and from incurring any expense in connection therewith, and from incurring any expense whatever in connection with the said proposed amendments or propositions. These two petitions are based upon the claim that under an act of the

*See generally, *note* to Phelps *v.* Lodge, Mayor, *et al.*, 1 Mun. Corp. Cas. 102; State *ex rel.* Gouldey *v.* City Council of Atlantic City, 1 Mun. Corp. Cas. 271; Garrison *v.* City of Laurens, 1 Mun. Corp. Cas. 581; *note* to State *ex rel.* City of Bridgeton *v.* Bridgeton, etc., Co., 2 Mun. Corp. Cas. 350; State *ex rel.* M. & J. Kaiser Water Co. *v.* City of Phillipsburg, 2 Mun. Corp. Cas. 351; *note* to State *ex rel.* Conrad *v.* Mayor, etc., of New Orleans, 4 Mun. Corp. Cas. 324; *note* to People *ex rel.* Dyett *v.* McMurray, 4 Mun. Corp. Cas. 740; People *ex rel.* Rogers *v.* Coler, City Comptroller, 5 Mun. Corp. Cas. 474; Hicks, County Auditor, *et al. v.* Cleveland, 5 Mun. Corp. Cas. 533.

legislature entitled 'An act to provide for public notice of proposed charter changes, and the method by which the city of Detroit may alter or amend its charter,' the said respondents are proceeding to hold an election in accordance with the provisions of the same. Section 1 provides that 'the charter of the city of Detroit shall be amended, altered, or repealed in the manner herein provided.' Section 2 of said act provides that 'upon the recommendation of the mayor of the city of Detroit, and by resolution approved by a three-fourths vote of the common council elect of said city, or by petition of five thousand qualified electors, said common council shall prepare in proper form and by title, and submit to the electors of said city, propositions to effect any amendment or amendments to the charter of said city. Such propositions shall be presented only in the month of November of any year.' Section 3 provides that 'any one and all such propositions shall be published by title and in full at least once a week for eight successive weeks during the months of September and October following the month of petition, in at least four newspapers published in the city of Detroit, and at least six half-sheet poster notices displayed conspicuously in each precinct of the city; and all such notices shall distinctly set forth the fact, in addition, that contemplated charter amendments are to be voted on at the approaching November election.' It is contended on the part of the respondents that the court has no jurisdiction in the matter by way of mandamus, that mandamus is not the proper remedy, and that the petitions in these cases are filed by private individuals, without the intervention of the attorney general. The court allowed the counsel to proceed to the argument on the petitions, not only upon the question of jurisdiction, but also upon the merits of the controversy, in which argument it appeared that there were no disputed facts, but that all the questions were questions of law. It is clear to us that if this same question had been presented to the court upon a bill in chancery, asking for an injunction to restrain the respondents from doing what they are claimed to be doing, as set forth in the petition, an injunction would be granted. It is also apparent to the court that the petitioners are interested as taxpayers in the manner in which the public moneys are expended, and, if expended illegally, they have such a personal interest, and the intervention of the attorney general is not essential, as in cases purely of a public nature. It is also apparent to the court that if application had been made to the attorney general to allow these cases to proceed, and he had declined, the court would compel him to intervene. And it is also apparent that the matter now before the court is of such immediate and pressing importance, the time intervening between now and the November election being so short, that it would be practically impossible to review the questions presented by these petitions in any other way than by mandamus. These conclusions compel the court to deter-

mine the issue. Nothing could be gained, as no legal right has been violated by allowing this matter to be heard upon the present petitions asking for a mandamus as prayed for.

"The question to be determined in this matter comes up on demurrer to the petitions. The main question, as we understand it, is whether the law known as the 'Eikhoff Law,' being the act which has already been designated by its title in this opinion, is a valid act, and within the power of the legislature to pass. As we understand the matter, all legislative authority, under the constitution, is placed in the legislature, and it has no power to delegate that authority to any one, unless in a constitutional way and by authority of law. It was contended upon the argument that there are numerous authorities holding that the legislature has authority to delegate legislative powers to municipalities, such as a city government; but, while this proposition may be true, it is only true as restricted by the law. The legislature has power to delegate certain legislative functions to the legislative branch of a municipal government, and the legislature might empower the common council of the city of Detroit to make by-laws or ordinances in the nature of legislative enactments; but in delegating this authority it must point out specifically the powers delegated, and the extent of those powers. The act under consideration goes further than this, and practically abandons all legislative functions on the question of amending or repealing the city charter, and it transfers that authority, or delegates that authority, not to the legislative branch of the city government, but to the mayor, the executive head of the municipality. He, and he alone, under a certain provision in section 2 of the act, can recommend such amendments to the city charter as he may desire, or he may recommend the repeal of the entire charter, if he sees fit, and, if approved by a three-fourths vote of the common council, it must be submitted to the electors of the city for their approval or rejection. The other provision of the law permits 5,000 qualified electors to present a petition to the common council proposing such amendments of the city charter as they may see fit, or even asking for a repeal of the same, and, upon the presentation of such petition, the common council has no alternative but to submit the question to the people for adoption or rejection. The legislative power, under these provisions of the law, which, under our system of government, rests with the legislature of the state, has been practically transferred to the mayor of the city of Detroit, or to any 5,000 electors who see fit to petition, on the subject of amendment or repeal of the charter. As far as the general people are concerned, they have nothing whatever to do with the matter, except the privilege of voting for or against any given proposition submitted to them; the framing of the proposition, the consideration of it previous to its being presented to the electors, being entirely beyond their power, as we construe this act. Any attempt upon the

part of the legislature to delegate wholesale, unqualified, and undefined authority, either to the mayor or any 5,000 citizens who may see fit to present a petition, is, in our opinion, contrary to the constitution and laws of this state.

"If it be urged that by this act legislative power is delegated, not to the mayor or to 5,000 electors, but to the electors residing within the territorial limits of the city of Detroit, it is equally clear that the act is unconstitutional. Section 38 of article 4 of the constitution provides: 'The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper.' This, at most, clearly means that the legislature shall, in its discretion, determine what legislative and administrative powers a municipality shall have. By this act, under respondents' contention, the municipality shall have such legislative and administrative powers as the electors residing in the municipality determine. In other words, the legislature has delegated the power which the constitution says it shall exercise to another body. This cannot be done, according to all principles of constitutional law.

"Other questions were presented for the consideration of the court, in regard to the manner in which the authority conferred by this law has been exercised by the common council; but, as we view the case, this is not essential for the consideration of the court in order to determine the issue, because, if the legislature had no authority to pass this law, all proceedings under it would be void. The demurrers in these cases are overruled, and a mandamus ordered to issue as prayed for."

H. H. Hatch, for relators.

Charles Flowers (Isaac N. Payne, of counsel), for respondents.

PER CURIAM. Affirmed.

STATE *ex rel.* LAMAR, Atty. Gen., *v.* DILLON *et al.*

(*Supreme Court of Florida, June 5, 1900.*)

[28 So. Rep. 781.]

Municipal Officers—Term of Office—Ordinances—Validity*—Effect of Invalid Provisions.—So much of the ordinance of the city of Jacksonville approved by the mayor July 23, 1894, and by a majority of the votes cast at an election in that city held October 9, 1894, entitled "An ordinance to prescribe the powers and duties and terms of office of the trustees of the waterworks and improvement bonds of the city of Jacksonville, and providing for the submission of this ordinance to the qualified

*See City of Shreveport *v.* Prescott, 2 Mun. Corp. Cas. 370; *notes* to State *v.* Omaha, etc., Bridge Co., 5 Mun. Corp. Cas. 356, and Gleason *v.* Barnett, 5 Mun. Corp. Cas. 520.

electors of the city for their approval at an election," as attempts to fix the terms of office of the trustees of the waterworks and improvement bonds at nine years, is void, because in conflict with chapter 4301, Laws 1893, which fixed the terms of all city officers at two years and until their successors were elected; but the presence of such invalid provision in the ordinance does not affect the validity of other valid portions thereof.

Same—Same—Same—Statute.—Chapter 4872, Laws 1899, does not attempt to create the board of trustees of the waterworks and improvement bonds of the city of Jacksonville, or to fix their terms of office, or to extend the terms of office of members of the board; neither does it attempt to validate the invalid portions of the ordinance passed by the city in 1894 creating said board.

Legislative Bills—Compliance with Constitutional Requirements.—If a bill be read in full on its final passage, this is a compliance with section 17, art. 3, Const. 1885, which requires that "every bill shall be read by its sections * * * on its final passage."

Same—Same.—The "final passage" of a bill, within the meaning of the provisions of the constitution of 1885 (section 17, art. 3), relating to the vote on the final passage of bills being taken by yeas and nays, and entered upon the journals of the legislature, means the vote in each house which adopts the bill, after it has passed its first and second readings, and after it has been read again for the purpose of being put upon its passage; and it is not required that a bill passed in one house, and amended and passed in the other, shall be read three times in the house originating the bill before it concurs in the amendments proposed by the other; nor is it required that the vote on the adoption of such amendments be taken by yeas and nays, and entered on the journal.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhydon M. Call, Judge.

Quo warranto, on the relation of W. B. Lamar, attorney general, against Benjamin F. Dillon and others. A demurrer to the information having been sustained, the relator brings error. Affirmed.

On November 8, 1899, an information in the nature of a quo warranto was filed by leave of court in the circuit court of Duval county alleging that: "William B. Lamar, attorney general of the state of Florida, who sues for the said state in this behalf, comes here before the judge of the circuit court of the Fourth judicial circuit of the state of Florida in and for Duval county, and in behalf of said state gives the said court to understand and be informed that Benjamin F. Dillon, George R. Foster, Thomas W. Roby, Philip Walter, A. Wm. Cockrell, Jr., Leopold Furchgott, Bion H. Barnett, Alexander B. Campbell, and Jacob R. Tysen, to wit, in the municipality of Jacksonville, in Duval county, in said state, for the space of one year now last past and upwards, having used, enjoyed, exercised, and performed, and still do use, enjoy, exercise, and perform, without warrant or authority, in violation of the existing constitution of said state, the franchise, functions, and powers of the office of the board of trustees of the waterworks and improvement bonds of the city of Jacksonville, and have actually assumed and exercised exclusive power and control over the construction, operation, supervision, and repairing of the waterworks,

sewers, and fire department of said city, and all buildings and grounds used therefor, and over the organization and operation of the same, and have actually assumed and exercised exclusive power to employ such chiefs or heads of departments, firemen, engineers, clerks, superintendents, laborers, and other persons as said board deem necessary for the execution of its duties, or supposed duties, and have actually made and entered into contracts in the carrying out and furtherance of said duties and functions or supposed duties and functions; which said office and the franchise and functions and powers thereof the said Benjamin F. Dillon, George R. Foster, Thomas W. Roby, Philip Walter, A. Wm. Cockrell, Jr., Leopold Furchgott, Bion H. Barnett, Alexander B. Campbell, and Jacob R. Tysen during all the time aforesaid usurped, and still do usurp, upon the people of said municipality and state aforesaid, to their great damage and prejudice.

"And the said attorney general of said state, who sues as aforesaid, further gives said court to understand and be informed that the said Benjamin F. Dillon, George R. Foster, Thomas W. Roby, Philip Walter, A. Wm. Cockrell, Jr., Leopold Furchgott, Bion H. Barnett, Alexander B. Campbell, and Jacob R. Tysen, to wit, in the municipality of Jacksonville, in Duval county, in said state, for the space of four months now last past and upwards, have used, enjoyed, exercised, and performed, and still do use, enjoy, exercise, and perform, without warrant or authority, in violation of the existing constitution of said state, the franchise, function, and powers of the office of the board of trustees for the waterworks and improvement bonds of the city of Jacksonville, and have actually assumed and exercised the exclusive power to appoint, subject to approval by the affirmative vote of the two-thirds of the members of the city council, all officers of said city not elected by the electors (except officers properly belonging to the department of the board of public works of said city) and all members of the police force, and have actually assumed and exercised the control and regulation of the organization, number, and compensation of members of the police force and fire department of said city, and have actually assumed charge, management, and control of the electric light plant of said city, and have assumed and exercised other functions, powers, and duties conferred upon said office, or supposed to be conferred thereupon; which said offices and franchises and functions and powers thereof the said Benjamin F. Dillon, George R. Foster, Thomas W. Roby, Philip Walter, A. Wm. Cockrell, Jr., Leopold Furchgott, Bion H. Barnett, Alexander B. Campbell, and Jacob R. Tysen, during all the period of the time aforesaid usurped, and still do usurp, upon the people of said municipality and state aforesaid, to their great damage and prejudice.

"And the said attorney general of said state, who prosecutes as aforesaid, further gives said court to understand and be

informed that the said Benjamin F. Dillon, George R. Foster, Thomas W. Roby, Philip Walter, A. Wm. Cockrell, Jr., Leopold Furchgott, Bion H. Barnett, Alexander B. Campbell, and Jacob R. Tysen, to wit, in the municipality, county, and state aforesaid, during the periods of time aforesaid, have usurped, and still do usurp, said office aforesaid, and the franchises and functions and powers thereof, as aforesaid, claiming warrant and authority therefor under and by virtue of an alleged ordinance of said municipality, which is in words and figures as follows, to wit:

"'An ordinance to prescribe the powers and duties and terms of office of the trustees of the waterworks and improvements bonds of the city of Jacksonville, and providing for the submission of this ordinance to the qualified electors of the city for their approval at an election.

"'Be it ordained by the mayor and city council of the city of Jacksonville:

"'Section 1. That the board of trustees of the waterworks and improvement bonds of the city of Jacksonville, from and after the passage of this ordinance by the affirmative vote of not less than three-fifths of all the members of the city council, and its approval by the mayor, and its subsequent approval by the affirmative vote of a majority of the votes cast by the qualified electors of the city at an election hereinafter provided for, in the manner hereinafter provided, shall constitute and be one of the executive boards of the city government, with the corporate authority, powers, and duties as herein provided.

"'Sec. 2. George R. Foster, A. Wm. Cockrell, Jr., Thomas McMurray, W. B. Young, A. B. Campbell, J. R. Tysen, L. Furchgott, B. R. Powell, and J. R. Campbell, and their successors in office, shall constitute said board of trustees of the waterworks and improvements bonds of the city of Jacksonville, hereinafter mentioned and referred to as "Bond Trustees," and shall hold office for a term of nine years, except that the first board shall hold office as follows: George R. Foster, nine years, Thomas McMurray, eight years, W. B. Young, seven years, A. B. Campbell, six years, J. R. Tysen, five years, L. Furchgott, four years, B. R. Powell, three years, J. R. Campbell, two years, and A. Wm. Cockrell, Jr., one year, from and after the 17th day of October, A. D. 1893, and until their successors shall be elected and qualified. The city council shall at its first regular meeting in October, or as soon thereafter as practicable, in each year elect one member of said board of bond trustees to fill the vacancies as they occur, and in case of vacancy other than by expiration of term the city council shall, as soon as practicable after such vacancy occurs, fill the vacancy for the unexpired term. A majority of all the members of the city council shall be required to elect a member of said board. Said board shall have the right to make its own rules; and to elect its own chairman

and secretary and other officers, and to remove or change the same by a vote of a majority of said trustees at any time. All contracts and other papers necessary to be signed by said board shall be signed by the chairman and secretary, and attested by the seal of said board.

"'Sec. 3. Said trustees shall receive no compensation except that said board may, by resolution approved by a city ordinance, fix a compensation to be paid to its chairman or secretary or both, for services rendered in such capacity, and said board of trustees shall submit to the city council such reports, and at such times, as the city council may by ordinance require.

"'Sec. 4. Five members shall constitute a quorum for the transaction of business. The ayes and noes shall be called and entered upon a journal upon the passage of every resolution or order for the expenditure of money. Said board shall by rules provide for the holding of regular and called meetings. Members of the board shall have a right to take part in all proceedings and deliberations of the city council on all questions relating to matters under their charge, but without the right to vote.

"'Sec. 5. The board of bond trustees shall not elect, or employ, or appoint, or contract with the mayor or any councilman or with any of the city officials.

"'Sec. 6. The board shall have exclusive power to employ such chiefs or heads of departments, foremen, engineers, clerks, superintendents, laborers, and other persons as it may deem necessary for the execution of its duties, and to fix their compensation, and that any of them may be discharged at any time by the board of bond trustees at its discretion.

"'Sec. 7. The board of bond trustees shall have exclusive power and control over the construction, operation, supervision and repairing of the waterworks, sewers, and fire department of the city, and all buildings and grounds used therefor, and over the organization and operation of the same, with the same powers, duties, and control over those subject-matters as now possessed or exercised by the board of public works; and all the provisions of the city charter and ordinances regulating the performances of those duties by said board shall equally apply to the performance of duties by said board of bond trustees, and the city council shall have the same control over expenditures by the bond trustees as over the expenditures by the board of public works.

"'Sec. 8. This ordinance shall be submitted to the qualified electors of the city for their approval at a city election to be called and held on the 9th day of October, A. D. 1894.

"'Sec. 9. The mayor shall cause the publication of his proclamation calling said election, and also this ordinance, immediately after his approval of this ordinance, and once each week for four weeks next preceding said election.

"'Sec. 10. The police commissioners, as commissioners of

election, shall, immediately after the publication of this ordinance, make or have made copies of the county registration books of Duval county, and lists of persons who have paid their poll taxes for the years 1892 and 1893, and prepare therefrom, and from such other information as they may be able to obtain, lists of the qualified electors of the city in each city ward, and shall correct the same daily as changes may appear from the county registration books and the lists of persons whose poll taxes are paid, and other information obtainable by them, to be necessary. All books, papers, and other records so made by the police commissioners shall be kept open to public inspection during reasonable hours. The police commissioners, as commissioners of election, shall take all practicable steps deemed by them necessary to the preparation of correct lists of the qualified voters in each city ward. Said election shall be conducted by the board of police commissioners, as nearly as practicable in all respects, as provided in an act of the legislature of the state of Florida, entitled "An act to fix the number and provide for the election of the municipal officers of the city of Jacksonville, a municipal corporation existing in Duval county, Florida, and to prescribe their terms of office and regulate their compensation," approved May 16, 1893, and all expenses necessarily incurred by the said board shall be paid as audited by the chairman of said board. Passed by the affirmative vote of more than three-fifths of all the members of the city council, July 23rd, 1894. Ordinance No. B. 189, approved July 23, 1894, published July 24th, 1894, and subsequently approved by an affirmative vote of a majority of the votes cast by the qualified electors of the city at an election held October 9th, 1894, as provided in said ordinance.'

"And also under and by virtue of chapter 4872, Laws Fla., approved May 30, 1899.

"And the said attorney general of said state, who prosecutes as aforesaid, further gives said court to understand and be informed that the said A. Wm. Cockrell, Jr., L. Furchgott, and J. R. Tysen, so named in said alleged ordinance, were each elected for the full term of nine years to succeed himself, at the expiration of their respective terms as fixed in said alleged ordinance; that Benjamin F. Dillon was elected for the unexpired term of W. B. Young, who resigned; P. E. McMurray was elected for the unexpired term of Thomas McMurray, who died, and after the death of said P. E. McMurray, to wit, April 23, 1898, Phillip Walter was elected for his unexpired term as his successor; that Thomas W. Roby was elected as the successor in office of J. R. Campbell, upon the expiration of his term as fixed in said alleged ordinance for the full term of nine years, and Bion H. Barnett was elected as the successor in office of B. R. Powell, upon the expiration of his term as fixed in said alleged ordinance for the full term of nine years; that all of said elections were had under and in accordance with section 2 of said alleged ordinance.

"And the said attorney general of said state, who prosecutes as aforesaid, further gives said court to understand and be informed that there is not and does not exist in said municipality and state aforesaid any such office as the office of the board of trustees of the waterworks and improvements bonds of the city of Jacksonville, as aforesaid, and further gives said court to understand and be informed that the ordinance above set forth at length, purporting to create such office as aforesaid, is unconstitutional and void, and of no effect, and such office does not exist, and has not existed, because said alleged ordinance aforesaid violates section 7 of article 16 of the existing constitution of the state aforesaid, in that the term of office is therein fixed, or attempted to be therein and thereby fixed, for a period of longer than four years; and further gives said court to understand and be informed that the said chapter 4872, Laws Fla., so purporting to create said office aforesaid, or to enlarge the franchises, functions, and powers of said office so purporting to be created by said ordinance as aforesaid, is unconstitutional and void, and of no effect, in this, to wit: First. It seeks to confer certain enumerated duties and powers upon a board of bond trustees that has no legal existence, and there are no instrumentalities with which to carry into operation and effect said powers and duties so sought to be conferred.

"Second. Said act seeks to make and does make said board of bond trustees a self-perpetuating body.

"Third. Said act creates, or seeks to create, an office the term of which is longer than four years.

"Fourth. The bill which became said chapter 4872 was not read by sections on its final passage in the senate of the state of Florida, but was read in full.

"Fifth. The bill which it is claimed became chapter 4872, Laws Fla., Sess. 1899, was introduced in the senate, and was known as "Senate Bill No. 237.' Said bill was declared to have passed the senate on May 20, 1899, and, as passed, was transmitted to the house of representatives, was there amended and passed as amended, and was on May 27, 1899, returned to the senate as having passed said house of representatives 'with the following amendments thereto':

"'Amend section 1. Strike out in the seventh line the words: "of the departments under its control or management." Amend section 1. In line 8, after the words "police force" insert "provided that officers properly belonging to the department of the board of public works shall be elected by the board of public works."

"'Amend section 2. In line 1, after the word "shall" insert "have charge, management and control of the electric light plant in addition to their present powers and duties; and"

"'Amend section 6. Strike out all of section 6, and insert the following, "All laws and parts of laws in conflict herewith are hereby repealed."

" 'Amend section 2. In line 14 strike out word "first" and substitute "tenth."

" 'Amend section 2. Add after word "year" at end of section, the following: For the quarter ending on the last of the months next preceding said months." '

"And the senate concurred in said amendments without taking a yea and nay vote thereon, and the yea and nay vote on said amendments, or on said bill with the amendments so made by the house of representatives, does not appear upon the journal of the proceedings of the senate, and was not entered upon the same.

"Whereupon the said attorney general prays the advice of this court in the premises, and the due process of law against the said Benjamin F. Dillon, George R. Foster, Thomas W. Roby, Philip Walter, A. Wm. Cockrell, Jr., Leopold Furchgott, Bion H. Barnett, Alexander B. Campbell, and Jacob R. Tysen, in this behalf to be made, to answer to the said people of said municipality and state by what authority or warrant they claim to use, enjoy, exercise, and perform the franchises, functions, and powers aforesaid."

To this information respondents demurred, and on December 16, 1899, the demurrer was sustained, the information dismissed, and respondents discharged without day, from which judgment this writ of error is taken, and the errors assigned question the propriety of this judgment.

W. B. Lamar, Atty. Gen., J. E. Hartridge, and J. S. Maxwell, for plaintiff in error.

A. W. & R. S. Cockrell and Barrs & Bryan, for defendants in error.

PER CURIAM. I. The third section of article 3 of the charter act of the municipality of Jacksonville (chapter 3775, Laws 1887) empowered the mayor and city council to create such offices, and to provide by ordinance for the appointment or election of all such officers, as might be necessary for the good government of the city, not in conflict or interfering with the duties of officers and appointees in that act provided for, whose compensation and terms of service were required to be fixed before their election. The mayor and city council were also empowered by said section to abolish at any time any office created by them. The charter act in terms provided for various officers and boards therein named, but the board of trustees named in the information was not created thereby, nor mentioned therein. By the first section of the act of 1893 (chapter 4301) the municipal officers of the city of Jacksonville were declared to be a mayor, city council, a board of public works, a board of police commissioners, a comptroller, treasurer, recorder, judge of the municipal court, marshal, and such other officers as might be provided by ordinance. The second section provided for the election by the qualified electors of the city of the mayor, comptroller, treasurer, and city council, and required the members of the board of public

works, police commissioners, judge of the municipal court, recorder, and all other officers of the city to be elected by the city council. It provided that all city officers should hold office for the terms of two years, and until their successors were elected, unless soon removed in the manner therein provided. It fixed the terms of all officers elected by the electors as beginning at noon of the third day after the day of election, and the terms of all officers elected by the city council as beginning at noon of the first day after the organization of each newly-elected city council. The fifteenth section of this act provided that the number, powers, duties, and terms of officers of all the city boards and city officers, excepting only the powers and duties of the city council, might be amended and changed at any time by an ordinance first passed by the affirmative vote of not less than three-fifths of all the members of the city council, approved by the mayor, or passed over his veto, and subsequently approved by the affirmative vote of a majority of the votes cast by the qualified electors of the city at an election. The act did not create or mention the board of trustees of the waterworks and improvement bonds, nor is there anything in the record to show that such board had ever been created by ordinance prior to the passage of that act. The ordinance set out in the information was passed in 1894, after the enactment of chapter 4301, and one of the principal contentions in the case on the part of plaintiff in error is that said ordinance creates the office of the board of trustees of the waterworks and improvement bonds of the city of Jacksonville, and that it is void because it undertakes to create an office the term of which is therein fixed at nine years, in violation of section 7, art. 16, of the constitution of 1885, which provides that "the legislature shall not create any office the term of which shall be longer than four years." Under the view we take of this case, it does not become necessary for us to determine whether this clause of the constitution has any application to the creation of municipal offices. The fifteenth section of chapter 4301, Laws 1893, authorizing the amendment and change of the number, powers, duties, and terms of office of all city officers and boards (excepting the powers and duties of the city council), extended only to such officers and boards as had been created or recognized by legislative enactment, and not to such officers as may have been created by the mayor and city council. The office of the board of trustees of the waterworks and improvement bonds had not, prior to the passage of the ordinance in question, been created or recognized by any act of the legislature; nor had the mayor and city council, so far as disclosed by the record, created, or attempted to create, such an office. Inasmuch as the ordinance creating the board, passed in 1894, undertook to transfer to it a part of the duties assigned by the statute to the board of public works, it was properly passed in the manner pointed out in the fifteenth section, but the

ordinance does not pretend to amend or change the terms of office of any office of the city created or recognized by the legislature. It does, however, create the board of trustees of the waterworks and improvement bonds, and undertakes to fix their terms of office at nine years, but the second section of the act (chapter 4301) definitely fixed the terms of all city officers at two years, which, in our judgment, embraced all the officers of the city, including those created by the mayor and city council, except where the terms of office of some office created or recognized by the legislature was amended or changed in the manner pointed out in the fifteenth section, which, as we have seen, is not the case here. From what has been said it is quite apparent that as to this particular office the legislature has neither created, nor authorized the city to create, the office in question with a term exceeding four years, so that it cannot be said that the constitutional provision insisted upon has been violated by the legislature, even if it applies to municipal officers. The attempt on the part of the city to make the term of office nine years is in conflict with the statute fixing the term at two years, and so much of the ordinance as attempts to fix the term at nine years is void; but we do not think this renders the entire ordinance invalid. The constitutional provision invoked, if applicable to municipal offices, is a limitation upon the power of the legislature, forbidding it to create, or to authorize the municipality to create, a municipal office the term of which shall be longer than four years; but its language is not addressed to municipalities, nor has the legislature addressed any such language to the city of Jacksonville in reference to offices to be created by the mayor and city council. That portion of the ordinance fixing the term of office at nine years is void because it is in conflict with the statute, which fixed the term at two years, and under these circumstances the rule applied by the supreme court of Indiana in Brewing Co. v. Claypool, 149 Ind. 193, 48 N. E. 228, cited by plaintiff in error, upon its construction of a constitutional provision similar to the one we have quoted from ours, has no application, even if it is a proper one to follow in cases like the one there under consideration. On the contrary, we think the rule applied by the supreme court of California in the case of People v. Perry, 79 Cal. 105, 21 Pac. 423, is the proper one for us to follow in the present case, and that the invalid provision fixing the terms of office at nine years may be rejected without affecting the validity of the other provisions of the ordinance, the officers named in the ordinance holding for the terms fixed by statute. Laws 1895, c. 4498, passed subsequent to the ordinance in question, repeals chapter 4301, Laws 1893, but it contains a provision that nothing therein should interfere with or invalidate the municipal government of the city of Jacksonville as it then existed, the officers of which, it was declared, were to continue in office until their successors were elected and qualified under the pro-

visions of that act, with an exception not affecting the question under consideration. It also contains provisions fixing the terms of all officers at two years, and until their successors are elected and qualified, unless removed in the manner therein provided, and designates the manner of the selection of all officers of the city, and the time when their respective terms shall begin, as did the act of 1893. This disposes of the only question argued upon this branch of the case.

II. The first and second sections of chapter 4872, Laws 1899, read as follows:

"Section 1. From and after the passage and approval by the governor of this act, the board of election commissioners of the city of Jacksonville as now existing shall be abolished. The board of bond trustees of the city of Jacksonville shall have exclusive power to appoint, subject to approval by the affirmative vote of two-thirds of the members of the city council, all officers not elected by the electors and all members of the police force: provided, that officers properly belonging to the department of the board of public works shall be elected by the board of public works. Three persons selected by the board of bond trustees from among the members of the said board shall be designated to perform all the duties of election commissioners in all matters relating to municipal elections. The organization, number and compensation of members of the police force and fire department shall be regulated and controlled by the board of bond trustees. The city council may, by ordinance, establish general provisions and requirements, which shall be followed by the mayor in the control, suspension and removal of members of the police force, designating the causes for and grounds upon which members of the police force may, upon specific charges be removed from office, and providing for the trial of such charges before the board of bond trustees; and after the publication of such ordinance no member of the police force who has served one year or more shall be removed from office except under and in pursuance of the provisions of such ordinance. The board of trustees of the waterworks and improvements bonds shall each year immediately after the election of a new member of said board of bond trustees reorganize said board by the election of a chairman and secretary and other officers. No person not a qualified elector of the city of Jacksonville shall be eligible to election to any office under the city government or appointment upon the police force.

"Sec. 2. The board of bond trustees shall have charge, management and control of the electric light plant, in addition to their present powers and duties, and from time to time fix the compensation of all employees or officers of the departments under its control and fix the charge for water and electricity, and shall require the payment to said board from each of the departments of the city government of the rea-

sonable value of the water and electricity used by them, based upon the prices usually paid by municipalities for water and electricity to persons or corporations furnishing the same; and all surplus revenues accruing after the most economical management of said system shall be applied semi-annually towards the payment of interest and sinking fund on account of the waterworks and improvement bonds of the city, and an itemized statement of the receipts and expenditures of each of said departments shall be made and published in a newspaper of general circulation on the tenth days of January, April, July and October of each year for the quarter ending on the last day of the months next preceding said months."

The other sections of the act have no bearing upon the questions involved in this case. It is contended that this act is unconstitutional and void upon the grounds stated in the information. (1) As to the first objection to the act, it is sufficient to say that the board of bond trustees has a legal existence, as has been shown in the preceding portion of this opinion; and it is not denied that, if such board exists, it can perform the duties and powers imposed upon them by the statute. (2) The argument upon the second objection is that the act confers power upon the board of bond trustees to appoint themselves as their own successors in office, subject to approval of the city council, thereby making them a self-perpetuating body. It is not alleged in the information that they have ever claimed or exercised the power to supply vacancies in their own body; neither is it denied that the power given them to appoint other officers subject to the approval of the city council is valid. In the absence of a specific allegation that the respondents are assuming the right to appoint themselves as their own successors, the court is not required to enter into an investigation as to their power to do so, even if this be the proper remedy for testing the right to exercise such power. (3) As to the third objection, the act does not attempt to create the board of trustees of the waterworks and improvement bonds, or to fix their terms of office, or to extend their terms of office as members of said board. In the clause directing them each year immediately after the election of a new member to reorganize the board, it is fair to say that the legislature did not deny the validity of the provisions of the ordinance fixing the terms at nine years, and that it is impliedly assumed in such clause that the terms of office of the members of the board would expire in accordance with the provisions of the ordinance. That provision might be eliminated without affecting the other provisions of the act, but we do not pass upon its validity, as we feel sure that clause was never intended to validate any invalid portion of the ordinance, or to extend the terms of office of the members of the board, or to fix any terms for them, but merely to require the reorganization of the board immediately after the election of a new member thereof. (4) As to the

fourth ground, it is difficult to see how the bill could have been read in full on its final passage without at the same time being read by sections. We think this objection without merit. State v. Hocker, 36 Fla. 358, 18 South. 767. (5) Sections 14 and 17, art. 3, Const. 1885, read as follows: "Sec. 14. Any bill may originate in either house of the legislature, and after being passed in one house, may be amended in the other." "Sec. 17. Every bill shall be read by its title on its first reading in either house, unless one-third of the members present desire it read by sections. Every bill shall be read on three several days unless two-thirds of the members present when such bill may be pending shall deem it expedient to dispense with this rule. Every bill shall be read by its sections on its second reading and on its final passage, unless on its second reading two-thirds of the members present in the house where such bill may be pending shall deem it expedient to dispense with this rule. The vote on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journal of each house; provided, that any general revision of the entire laws embodied in any bill shall not be required to be read by sections upon its final passage and its reading may be wholly dispensed with by a two-third vote. A majority of the members present in each house shall be necessary to pass every bill or joint resolution; all bills or joint resolutions so passed shall be signed by the presiding officer of the respective houses and by the secretary of the senate and the clerk of the house of representatives." There are differences of opinion among the courts as to what constitutes the "final passage" of a bill, within the meaning of constitutional provisions relating to the vote on the final passage of bills being taken by yeas and nays, and entered upon the journals of the legislature. Cases have been cited to us holding that the "final passage" meant is the vote in each house which adopts the bill as it is afterwards enrolled and presented to the governor for his signature. The provision which we have quoted from our constitution speaks of the first and second reading and final passage of the bill, and it seems to us, from the connection in which they are used, that the words "final passage" in our constitution can legitimately refer to nothing else than the vote in each house which adopts the bill after it has passed its first and second readings, and after it has been read again for the purpose of being put upon its passage. No doubt, after passing one house, it may be very materially amended in the other, and there passed as amended. The constitution expressly recognizes this fact, and authorizes it to be done; but it does not require such bill as amended to be read three times in the house originating the bill before concurring in the amendments proposed by the other (State v. Hocker, 36 Fla. 358, 18 South. 767), nor does it require the vote on the adoption of the amendments to be taken by yeas and nays, and

entered on the journal. The clause quoted was framed in view of parliamentary practice, as is evident from the use of the terms "first and second readings" and "final passage," and its object was to regulate the number of readings to which the bill should be subjected in each house, and to require the vote to be taken by yeas and nays, and entered upon the journals upon the passage of the bill after such readings. Such has been the legislative construction of the provision in question for many years, and we are satisfied that construction is correct. This disposes of all the material questions presented, and results in the affirmance of the judgment.

The judgment is affirmed.

CITY OF NEW ORLEANS, Petitioner, *v.* JOHN FISHER, Tutor, etc., *et al.*

(*Argued October 12, 1900. Decided January 28, 1901.*)

[21 Sup. Ct. Rep. 347.]

School Taxes Held in Trust by City—Liability of City to Account to Judgment Creditors of School Board.—Judgment creditors of a city school board, whose claims are payable out of the school taxes, are entitled to require the city to account for the amount of such taxes collected and held in trust by the city for the payment of the expenses of the public schools, where the school board declines to compel such an accounting.

Suit by Judgment Creditors—Statute of Limitations.—The ten years' statute of limitations is no bar to a suit by judgment creditors of a city school board, whose claims are payable out of the school taxes, to require the city to account for the amount of such taxes collected and held in trust by it for the payment of the expenses of the public schools, where the bill was filed within ten years after the judgments were rendered.

Federal Procedure—Impeachment of Judgment*—Collateral Attack—Creditor's Bill against City.†—A judgment of the circuit court of the United States as to the competency of the plaintiff's assignors to sue in that court, and the diversity of citizenship between the parties, is not open to impeachment on either ground, either collaterally or on a creditor's bill, where an objection to jurisdiction on the first ground was raised and overruled in the proceedings resulting in the judgment, and the petition alleged diversity of citizenship.

Pleading—Striking Irregular Plea.—The action of the circuit court of the United States in striking off as irregular a plea to the jurisdiction, which was put upon the files without leave of court, is not open to review.

Federal Jurisdiction—Diversity of Citizenship—Ancillary Action.—Diversity of citizenship between the parties is not necessary to the jurisdiction of the circuit court of the United States in an ancillary action to enforce the payment of a judgment of that court out of a fund which by such judgment was made liable for its payment.

Federal Procedure—Refusal of Leave to File Plea.—The refusal by the circuit court of the United States of an application for leave to file a plea in an ancillary action, alleging that plaintiff was a citizen of the same state with defendant at the time the original action was brought, and had so continued down to the filing of the bill, but had fraudulently otherwise represented, and that defendant had no knowledge of these

*See Howard *v.* City of Huron, 26 L. R. A. 493.

†See Addyston Pipe & Steel Company *v.* Chicago, 170 Ill. 580, 44 L. R. A. 405.

facts until after exceptions to the master's report were filed, is not an abuse of discretion, where nothing was said in the proposed plea as to the citizenship of a coplaintiff who was a necessary or proper party, and who, the record showed, was an alien.

Interest on School Tax Collected as a Penalty—Not a Part of the City Revenues.—Interest collected by a city as a penalty for nonpayment of school taxes forms no part of the city's revenues, but should be included with the taxes, where the city holds them in trust for the purpose of paying the expenses of the public schools.

Liability of City to Creditors of School Board for Interest on School Tax.—The city of New Orleans cannot be permitted to escape liability to the creditors of the school board for the amount of interest collected by it as a penalty for delayed payment of school taxes, on the ground that school taxes are not within La. Acts 1879, act No. 48, § 9, inflicting such penalty on "all taxes imposed by the city."

Running of Interest on School Taxes Held by City.—Interest will not commence to run upon the amount of school taxes collected by a city as agent for its school board and retained by it, until after a failure to pay such sums when required so to do, or failure to account on demand.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision modifying a decree of the Circuit Court on a creditor's bill against a city. Decree modified and affirmed.

See same case below, 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. Rep. 574.

Statement by MR. CHIEF JUSTICE FULLER:

This was a bill filed by Mrs. M. M. Fisher, joined and authorized by her husband, John Fisher, citizens of the Kingdom of Spain, May 11, 1896, against the city of New Orleans, in the circuit court of the United States for the eastern district of Louisiana, which alleged—

"That she recovered a judgment in this honorable court against the board of school directors, a corporation created by the laws of the state of Louisiana, and a citizen thereof, in the sum of more than $10,000, as more fully appears by the record of said suit;

"That your oratrix obtained two other judgments against the same school board, before the civil district court for the parish of Orleans, amounting in the aggregate to many thousand dollars;

"That all of said judgments are now final; that they are made payable out of the school taxes levied by the city of New Orleans prior to 1879.

"Your oratrix avers that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of the city of New Orleans.

"1st. That the city of New Orleans has failed to collect the said taxes punctually, and that it was through her fault and negligence that the same remain uncollected, and by reason of her neglect she has become liable for the amount of taxes yet remaining uncollected.

"2d. Your oratrix further complains and says that said

taxes, under the law, carried interest at the rate of 10 per cent. per annum, and that the city of New Orleans has never paid to the school board any of the interest due on said taxes, but she has misapplied and diverted the same to other unlawful uses.

"3d. Your oratrix further avers that the school board created the obligation against said school taxes, by virtue of contracts which were legally entered into, and your oratrix was protected by the Constitution of the United States from any impairment of her contract.

"That in violation of this constitutional right the state of Louisiana passed act No. 82 of 1884, which directed that the property of delinquent taxpayers should be sold for what it would bring, and that all taxes due thereon should by virtue of said sale be canceled.

"That by reason of said law the city of New Orleans allowed the property on which the school taxes were due to be sold for state taxes, and she caused the city taxes, including the school taxes, to be canceled; that she was thus guilty, 1st, as a delinquent trustee for not having enforced the collection of the said tax; and, 2d, for having failed to protect the interest of your oratrix at said state tax sale; that the cancellations thus made amount to many thousands of dollars.

"4th. That the said city of New Orleans at various times passed ordinances canceling and annulling the said taxes and remitting the interest thereon;

"That your oratrix is unable to give the exact amount of each kind of violations of her obligations by the trustee, and it is absolutely necessary to make the city of New Orleans account for the various amounts which have been lost to your oratrix through the unfaithfulness of said trustee.

"That the board of school directors to whom the city of New Orleans should account have refused to demand such an account, and will continue so to do, and your oratrix would be left without a remedy.

"That the fund which the city of New Orleans administers seems now to be insufficient to satisfy the demands of all the creditors who are entitled to be paid out of the same.

"Your oratrix further avers that her judgments are made directly payable out of the school taxes levied prior to 1879, and she has an equitable lien thereagainst enforceable before a court of equity.

"She further avers that under the law her certificates which are merged in her judgments have been, under the law, received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors.

"That for those reasons your oratix brings her bill against the city of New Orleans and the board of directors of the city schools of New Orleans for an account.

"Your oratrix brings this bill for herself and all parties

similarly situated who are willing to appear and contribute to the costs thereof, they being too numerous to be made parties hereto."

The prayer was that the city school board and the city answer, and "give a full, fair, and perfect account of all the school taxes collected by the city of New Orleans for the years 1873, 1874, 1875, 1876, 1877, and 1878; of all the interest received thereon by said city and never accounted for; of all the taxes which were not collected for want of proper enforcement, and which have since been canceled both by sales made by the state tax collectors and by ordinance adopted by the city council;" and for general relief.

Subsequently a supplemental bill was filed in respect of property alleged to have been acquired by the city through seizures for taxes.

The bill was taken as confessed as against the school board, and general demurrers were filed by the city, and overruled.

The city thereupon, March 12, 1897, answered, admitting "that oratrix recovered judgments against the board of school directors, a corporation of the state of Louisiana, and a citizen thereof, both in this honorable court and in the civil district court for the parish of Orleans, as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein; . . . that all of said judgments are now final and are payable as decreed and provided for in the said judgments;" but denying "that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public school of said city;" and "that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be."

Also admitting "that the city of New Orleans had never paid to the school board any interest which she may have collected on any back taxes, and defendant denies that any such interest, if same has ever been collected, was due to the school board, and defendant denies that she has ever misapplied or diverted to unlawful uses any interest that she may have collected from delinquent taxpayers or back taxes, and defendant avers and shows that by express provision of law all interest which she may collect on any back taxes is especially set aside for certain purposes, and cannot by her be used for school purposes or for any other purpose than that commanded by law;" and denying "that the school board created the obligation against the school taxes, set forth in oratrix's bill of complaint, by virtue of any contracts legally entered into, and denies that the oratrix has any right to invoke the protection of the Constitution of the United States

herein, and denies that the provisions of the same regarding impairment of contract have been in any manner violated by this defendant; . . . that act No. 82 of 1884 was passed in violation of any constitutional rights of oratrix in the premises, and defendant declares that whatever was done by the state of Louisiana in passing the said act, if it was done, was within the legislative authority, and the said taxes and legislative provisions were subject to change, amendment, and repeal by the same authority which created them; and defendant shows and avers that the city of New Orleans had no authority or control over the action of the legislature in the premises; . . . that the city of New Orleans allowed any property on which school taxes were due, to be sold for said taxes, and denies that she caused the city taxes, including the school taxes, to be canceled; . . . that she has been or is guilty as a delinquent trustee for not having enforced the collection of said taxes; denies that she ever was a trustee in the matter; denies that she ever failed to enforce the collection of any taxes which it was her duty to enforce; denies that it ever was her duty to protect the interests, if any she had, of oratrix, at said tax sales; denies that oratrix had any such interest, and denies that there were any such tax sales; . . . that any cancellations amounting to many thousands of dollars, or to any amount, were made by reason of said sales as set forth in oratrix's bill of complaint; . . . that the city of New Orleans passed ordinances canceling and annulling any taxes, or remitting any interest thereon, but if any taxes were so canceled or remitted, defendant avers the same was done by authority of law or by judgment of a competent court. Defendant denies that there was or is any obligation on the part of the city to account either to the school board or to the oratrix for any taxes, moneys, or appropriations such as are set forth in oratrix's bill of complaint."

The answer further denied "that it was the duty of the school board to call this defendant to account, and denies that the school board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the school board and this defendant, or between Mrs. Fisher and this defendant. And further answering defendant says that if any such cause of action for an accounting ever did exist in favor of said school board or of said oratrix, the same was effective and executory in the year 1880, and became actionable and exigent in the year 1880, and in the years following the year 1873 up to 1879 inclusive; that said action of accounting was personal to said school board, and could only be exercised and availed of by the said school board, which action is prescribed by the lapse of ten years from and after each of the said years, and that oratrix has no right or cause of action in the premises;" and "that there is any fund now administered, or which ever was administered, by the city of New Orleans,

derived either from appropriations, taxes, or moneys said to be due said school board, and denies that if there is or was any such fund, that the said school board or oratrix has any rights in the premises."

It was admitted "that the judgments of oratrix are payable as stipulated in said judgments," but denied "that oratrix has any equitable lien enforceable against the city of New Orleans before a court of equity by reason thereof;" and also "that under the law were the certificates which she alleges have been merged in her judgments ever received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors."

The city further denied the purchase of property "for the taxes due for the years during which oratrix's claim is alleged to have arisen;" any resulting trust if purchases had been made; any statutory lien; and "that the oratrix has any right or reason to invoke the equitable jurisdiction of this honorable court."

Replication was filed, and the cause referred to a master "to take a full, true, fair, and perfect account of all the funds, principal and interest, received by the city of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877, and 1878, of all interest remitted illegally, of all properties purchased for said taxes as more fully prayed in the bill and supplemental bill filed herein, and to that effect the parties shall produce before said master all books, papers, documents to be examined and which may be necessary or proper in the premises."

Numerous persons claiming to have judgments against the school board, similar to the judgments of Mrs. Fisher, intervened and asked to share in the proceeds of any amount found to be due by the city of New Orleans on the accounting. May 22, 1897, the master reported:

"1st. The city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of $23,180.03.

"2d. The proportion of the interest actually collected by the city of New Orleans on the taxes of the years 1871 to 1878, both inclusive, up to January 1st, 1897, to which the school board will be entitled, if it is entitled to the same proportion of the interest as of the principal of said taxes, is $48,758.75.

"It is a question of law whether the school board is entitled to any part of the interest. I think it is. The interest as a mere accessory of the principal belongs, in my opinion, to the same person to whom the principal belongs. Accordingly, in my opinion, the amount the city of New Orleans now owes to the school board for taxes collected, and for interest on the taxes collected, is, as above stated, $71,938.78."

That complainant had abandoned the attempt to show that the city owed anything on account of properties purchased

for taxes. That the city was not chargeable "with the calculated amount of interest not collected." And "that the following parties have proved their claims against the fund herein, by judgments rendered in their favor against the school board, in the civil district court for the parish of Orleans, namely:

M. M. Fisher	$11,094 87
"	8,802 39
"	5,864 64
T. J. Gasquet	57,059 69
Jose Venta	21,297 72"

Complainants with several interveners filed exceptions to the master's report, and on June 7, 1897, the city of New Orleans filed exceptions as follows:

"Defendant excepts to that part of the report of the master wherein he expresses his opinion that the interest on taxes is a mere accessory of the principal, and belongs to the person to whom the principal belongs, and that, therefore, in his opinion, the city of New Orleans owes the school board for taxes collected and interest collected. Exceptor excepts to this on the ground that:

"1st. It was no part of the master's duty, under his reference, to decide this question or to express any opinion upon the question of law involved therein; but in the event that the court overrules this exception and holds that such was his duty, then and in that case the city of New Orleans excepts to his conclusions of law, and asserts that, on the contrary, his conclusion is erroneous; that the interest does not follow the taxes, and does not belong to the party to whom the taxes belong.

"Defendant excepts to the statement of the master that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, is due by the city to the school board or to the board of liquidation at any time since its collection."

June 29, 1897, the city filed an exception to the jurisdiction of the court ratione materiæ et personæ, averring "that plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action;" and on July 1 a plea in abatement "that plaintiff, Mrs. M. M. Fisher, and defendant are both citizens of the state of Louisiana, and that by reason thereof this court is without jurisdiction ratione personæ." This exception and plea were afterwards stricken from the files as irregular and not filed in accordance with the rules. The city then offered in open court to file a motion and a plea further attacking the jurisdiction of the court, but leave was refused; and thereafter the case came on for final hearing on the bill, answer, replication, exhibits, proofs, and testimony, and master's report.

Included in the evidence offered on behalf of complainant

were the pleadings and judgment in the cause of Mrs. Fisher against the school board, in which judgment was rendered in the circuit court, May 19, 1892. The petition in that case alleged that Mrs. Fisher and her husband were "both citizens of the Kingdom of Spain residing in the island of Cuba;" counted upon a judgment against the school board rendered by the civil district court of the parish of Orleans; and stated that the claim which formed the basis of the judgment was for salary due petitioner as a school teacher of the public schools of the city, and for the salary of other teachers whose claims had been transferred to petitioner. The defendant filed an exception to the effect that the court was without jurisdiction, as the rights, credits, and school warrants proceeded on were held by petitioner under assignments, and that the assignors were all citizens of the state of Louisiana and without right to sue defendant in the circuit court. This exception was tried before a jury and a verdict rendered in favor of petitioner, whereupon the exception was overruled, and judgment was thereupon rendered in favor of petitioner for $8,097.17, the amount of the judgment rendered in the state court. It appeared that on this judgment garnishee process had been served on the city treasurer and ex officio treasurer of the school board, and the sums of $1,893.09 and of $312.56, less costs, realized in 1894 and in 1895.

On February 21, 1898, the court gave judgment in favor of plaintiffs and interveners, and, among other things, decreed: "That the city of New Orleans, trustee of the special school taxes levied and collected for the years 1871 to 1878 inclusive, be condemned to pay plaintiff and interveners the said taxes, received and collected by her, as follows: $71,938.78 with 5 per cent. interest per annum on $71,139.60 from January 24th, 1881, and on $799.18 from May 11th, 1896, until paid. And it is further ordered that this bill be retained for a further accounting and such orders and decrees as may be necessary."

Mrs. Fisher died February 25, 1898, and on April 22, 1898, John Fisher was made party complainant as natural tutor of his minor children. April 23, 1898, the city filed a petition for rehearing, which was denied, but the court directed the final decree to be amended so as to only allow interest on the amount recovered, to wit, $71,139.60 from February 21, 1898, the date of said decree, instead of from January 24, 1881, as theretofore allowed. On the same day, April 23, and prior to the decision on the rehearing, a plea in abatement was put in by the city to the effect that John Fisher, being a citizen of Spain, was unable to prosecute the suit, and that it should be abated because a state of war existed between Spain and the United States and the subjects and citizens thereof. On the proofs the court was satisfied that complainant was a citizen of Great Britain, whereupon the plea was overruled. From the decree of the circuit court both parties appealed to the circuit court of appeals for the fifth circuit, which modified the

decree so as to allow 5 per cent. interest on the sum of $71,139.60 from January 24, 1881, and on the sum of $799.18 from May 8, 1897, and as so modified the decree was affirmed, with costs. 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. Rep. 574.

The city applied to this court for the writ of certiorari, which was granted.

Messrs. J. J. McLaughlin, Branch K. Miller, and Samuel L. Gilmore for petitioner.

Messrs. Charles Louque and E. H. McCable for respondents.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

Fourteen errors were assigned in the circuit court of appeals, which were considered and disposed of seriatim. Many of these alleged errors raised questions not within the exceptions to the master's report, and, in any view, we think the case may be determined without minutely retraversing the ground.

Mrs. Fisher and her husband recovered judgment against the board of school directors in the state district court May 22, 1890, which, on appeal, was affirmed by the supreme court. Fisher v. New Orleans Directors of City Schools, 44 La. Ann. 184, 10 So. 494.

February 23, 1892, Mrs. Fisher and husband brought an action against the school board on the judgment so recovered, in the circuit court of the United States for the eastern district of Louisiana. The petition set forth that Mr. and Mrs. Fisher were citizens of the Kingdom of Spain, and that the judgment sued on was recovered on certain claims for school teachers' salaries, including Mrs. Fisher herself. An exception was filed to the jurisdiction of the court on the ground that the assignors of the school warrants held by Mrs. Fisher as assignee could not have sued in that court. The matter was submitted to a jury, and a verdict returned in plaintiffs' favor, whereupon the exception was overruled, and afterwards the case went to judgment payable out of the school taxes levied prior to 1879. This judgment was rendered May 19, 1892, and on May 11, 1896, the present bill, in the nature of a creditor's bill, was filed on behalf of Mrs. Fisher, joined and authorized by her husband (setting up that judgment and others), and of all others similarly situated, to compel an accounting for their benefit by the city in respect of the school taxes levied prior to 1879, and the interest thereon, collected and not paid over to the school board, as a trust fund for the payment of the expenses of the public schools, it being averred that the school board had refused to require such accounting.

After demurrer filed and overruled, the city answered, admitting the recovery of the judgments as alleged; that they had become final; and that they were payable as provided therein; and denying that the school taxes collected constituted

a trust fund; any liability for interest collected; any privity between Mrs. Fisher and the city; and pleading prescription by the lapse of ten years.

The cause was referred to a master, who reported certain amounts of school taxes, and of interest on school taxes, collected by the city. The city filed exceptions to the conclusions of the master that the city was indebted to the school board for interest collected; and that the amount reported as collected out of the school taxes from 1871 to 1878 inclusive was due by the city to the school board "at any time since its collection."

The facts are not in controversy, and the questions raised, or attemped to be raised, are questions of law.

The bill invoked the ordinary exercise of equity jurisdiction in this class of cases. The school taxes collected were held in trust by the city, and, as the school board declined to require an accounting, these creditors, whose claims were payable out of the taxes, were entitled to the interposition of a court of equity to reach the fund. The suggestion of want of privity between complainants and the city, as defeating the jurisdiction, is without merit. Nor is the defense of the statute of limitations well founded.

The judgments were rendered since 1890, and were made payable out of these taxes; the school certificates were merged in these judgments; and this bill was filed within ten years.

As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other; the possession of the city was precarious, and not animo domini; and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation. Oliver v. Piatt, 3 How. 411, 11 L. Ed. 657; New Orleans v. Warner, 175 U. S. 130, 44 L. Ed. 102, 20 Sup. Ct. Rep. 44.

After the master's report and the exceptions thereto had been filed, the city undertook to raise the question of the jurisdiction of the circuit court on the ground of the want of competency in the assignors of Mrs. Fisher to sue in that court, and of want of diversity of citizenship between Mrs. Fisher and the city. The first of these objections had been made and, after trial, overruled in the proceedings which resulted in the judgment of May 19, 1892. The petition in that case also alleged that Mrs. Fisher and her husband were citizens of Spain. The judgment was conclusive on both points, and not open to impeachment as to either collaterally or on a creditors' bill. Mattingly v. Nye, 8 Wall. 373, 19 L. Ed. 381; Evers v. Watson, 156 U. S. 533, 39 L. Ed. 522, 15 Sup. Ct. Rep. 430; Laing v. Rigney, 160 U. S. 539, 40 L. Ed. 527, 16 Sup. Ct. Rep. 366.

On July 1, 1897, a plea to the jurisdiction of the court in this case because Mrs. Fisher was a citizen of Louisiana was put

upon the files without leave of court, and was stricken off as irregular on December 20. This action of the court is not open to review, and as this bill was merely ancillary the plea was immaterial. Root v. Woolworth, 150 U. S. 413, 37 L. Ed. 1126, 14 Sup. Ct. Rep. 136.

The city on the same day, December 20, applies for leave to file a plea alleging that Mrs. Fisher was a citizen of Louisiana at the time the original action was brought in the circuit court, and had so continued down to the filing of the bill; that she had fraudulently otherwise represented; and that the city had no information of the facts until after the exceptions to the master's report were filed, which was on the 7th of June. This application was denied by the circuit court, and it is impossible for us to say that in this ruling the court abused its discretion.

This was not the proper way to attack the original judgment on the ground of fraud; nothing was said in the proposed plea as to the citizenship of Mr. Fisher, who was a party plaintiff, and a necessary or at least proper party, if the choses in action sued on were community property, and even if paraphernal (La. Civil Code, §§ 2402, 2404, 2385); and the record, so far from indicating fraud, showed that Mr. Fisher was an alien, being a subject of the British Crown residing at Cuba, which had led to a mistake of counsel in framing the pleadings.

It may be added that there was nothing in the case bringing it within the exceptional rule applied in Lawrence Mfg. Co. v. Jamesville Cotton Mills, 138 U. S. 552, 34 L. Ed. 1005, 11 Sup. Ct. Rep. 402, relied on by counsel.

The city excepted to the inclusion of the interest on school taxes collected by the city with the school taxes collected, as part of the amount for which the city was liable.

The circuit court of appeals disposed of this point in these words:

"Under the law, the school taxes carried 10 per cent. interest per annum from the day they became delinquent. It was a penalty for nonpayment of the taxes. This interest, or penalty, for delayed payment of school taxes, formed no part of the city's proper revenues. The city in collecting the same was acting as a trustee for the school board. Delay in payment of taxes operated to the prejudice, not of the city, but of the school fund and its creditors. We are unable to find any authority in law or morals for the city to appropriate to itself this interest. To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes due the school fund. We fully agree with the master that 'the interest, as a mere accessory of the principal, belongs to the same person to whom the principal belongs.'" 34 C. C. A. 24, 63 U. S. App. 472, 91 Fed. Rep. 583.

We concur in this view, and are, moreover, of opinion that the city, having made such collections, cannot now be per-

mitted to escape liability therefor on the suggestion that school taxes are not within the terms of the statute inflicting the penalty on "all taxes imposed by the city of New Orleans." Acts La. 1871, No. 48, § 9.

The only other matter necessary to be referred to is the allowance of interest. The circuit court by its amended decree gave interest on the larger sum found due from the date of the decree. The circuit court of appeals modified that decree so as to award interest on the sum of $71,139.60, collected prior to January 24, 1881, from the latter date, and on the item of $799.18, reported by the master May 8, 1897, as having been collected after January 24, 1881, from the date of the report.

The bill did not charge the city with any wilful default, nor did it appear therefrom when the school board was requested to demand an accounting. The bringing of the bill amounted to such demand, and it was filed May 11, 1896, and the appearance of the city entered June 1.

The city occupied the position of agent of the school board to collect and pay over school taxes, as held in Labatt v. New Orleans, 38 La. Ann. 283, yet it may fairly be said that, under the legislation upon the subject, it was not the duty of the city to pay the money over immediately, but only as occasion might arise, and that, as no charge of fraudulent conversion was made, interest would not commence to run until after failure to pay when required to do so, or failure to account on demand.

Where interest is sought by way of damages for delay, courts of equity exercise a certain discretion as to its allowance.

In view of the acquiescence of the school board in the retention by the city of the interest collected on school taxes, an acquiescence in good faith so far as appears; the attitude of the city as a public corporation; and the lack of averment or evidence of demand prior to the filing of the bill, or of effort to compel an accounting—we think that interest should not be allowed in this case prior to May 11, 1896.

The decree of the circuit court of appeals is modified so as to provide for 5 per cent. interest on the sum of $71,139.60 from May 11, 1896, and on the sum of $799.18 from May 8, 1897, and as so modified is affirmed with costs; and the cause is remanded to the circuit court with a direction to amend its decree in the particulars above specified, it being affirmed as so modified.

MR. JUSTICE PECKHAM and MR. JUSTICE McKENNA took no part in the consideration and disposition of the case.

CITY OF NEW ORLEANS, Petitioner, *v.* ANN WARNER *et al.*

(*Argued Dec. 11, 13, 1900. Decided Jan. 28, 1901.*)

[21 Sup. Ct. Rep. 353.]

Creditors' Bill*—**Parties Allowed to Come in after Decree.**—Parties holding obligations of the same nature and kind as plaintiff in a suit brought by him on his own behalf as well as on behalf of all such persons may, after a decree in his favor, come in and prove their claims without formal interventions or special leave.

Objections to Decision of Master—Not to Be Urged upon an Appeal Arising upon Exceptions to the Report.—No objections as to what a master has done upon a reference can be taken upon an appeal arising on exceptions to his report, where he has followed the decree ordering the reference, and enforced its directions.

New Defenses—When Cannot Be Set Up.—A new defense cannot be set up by exceptions to the report of a master after the merits of the case have been fully considered and determined.

Authority to Issue Warrants†—Construction of Statute—Acquiescence.—Authority of the city of New Orleans to issue warrants in settlement of the damages claimed by a ship canal company will be deemed to have been conferred by La. act February 24, 1876, empowering the city to "transact and contract" for the purchase and settlement of any rights, franchises, and privileges of such company, and to purchase its dredging plant, in view of the long acquiescence of the city in this construction of that act, and of the impossibility of distinguishing between these warrants and such as were issued in payment of the plant.

Issue of Warrants—Construction of Statute.—The issue of warrants by the city of New Orleans as a compromise of drainage taxes collected by the city and misappropriated was authorized by La. act February 24, 1876, providing for the purchase and settlement by the city of all or any rights arising in favor of the Mississippi & Mexican Gulf Ship Canal Company, and by an ordinance providing for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans of all rights" arising in favor of the canal company.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree of the Circuit Court overruling exceptions to a master's report. Affirmed.

See same case below, 41 C. C. A. 676, 101 Fed. Rep. 1005.

Statement by MR. JUSTICE BROWN:

This was a writ of certiorari to review a decree of the court of appeals, rendered May 1, 1900, affirming a decree of the circuit court for the eastern district of Louisiana, rendered March 26, 1900, which overruled certain exceptions of the defendant, the city of New Orleans, to a master's report upon the amounts due under a decree rendered by the court of appeals, May 7, 1898, and affirmed by this court January 15, 1900. 175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44.

The decree of the circuit court of appeals, affirmed by this court, contained the following paragraphs:

1. That the city of New Orleans was indebted to John G. Warner in the sum of $6,000, with interest, and that he was

*See Addyston Pipe & Steel Company *v.* Chicago, 170 Ill. 580, 44 L. R. A. 405.

†See *note*, 5 Mun. Corp. Cas. 739.

entitled to be paid such sum out of the drainage assessments set forth in the bill.

2. That such drainage assessments constituted a trust fund in the hands of the city for the purpose of paying the claims of the complainant and holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of Louisiana, approved February 24, 1876.

3. That it be referred to a master to take and state an account of all said drainage assessments; that warrant holders be entitled to establish their claims before the master without formal interventions or special leave of the court, and that, upon the coming in of his report, complainant and other claimants would be entitled to an absolute decree for the amounts due them, if the fund established by the accounting be sufficient, but, if not sufficient to pay such claims in full, then for the proper pro rata thereof, etc. The other provisions of the decree are immaterial.

Upon this reference warrants to the amount of $316,000, of a total of $320,000 ($4,000 having been paid), were presented by different parties, including Warner, and the master found: (1) That all these warrants were "issued to Warner Van Norden, transferee of the Mexican Gulf Ship Canal Company, by the defendant, the city of New Orleans, in payment of the consideration of the agreement and contract of sale between himself and said city, by act (of sale) . . . dated June 7, 1876, as in said act specified, pursuant to the authority of the act of the legislature of Louisiana No. 16, dated February 24, 1876, as set forth in the complainant's bill, etc.; . . . that each of said warrants was indorsed in blank by Warner Van Norden, transferee, to whose order they were made payable, and delivered to said claimants, or other parties through whom they have acquired title; and that the said Van Norden has since . . . formally transferred to the complainant, and to all holders of warrants who might intervene in this cause, any and all interest he ever had in said warrants, and subrogated them to all his rights of actions and remedies against the defendant appertaining to the same."

Exceptions were filed to this report upon the ground: (1) That the advantages of the decree extended only to such warrants as were issued in payment of the property purchased by the act of sale, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750; "that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchased warrants in the sense of the opinions and decrees of the circuit court of appeals and of the Supreme Court herein; that such balance of said warrants was issued in settlement of a claim for damages urged by the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden against the city of New Orleans."

(2) "That of said warrants the sum of $20,000 were issued, as will appear by the express terms of the act, in payment of work which has been done by said Van Norden; that is, digging canals and building levees which, at the time of the passage of said act, had not been surveyed or measured by the city surveyor; and hence that as to these warrants there could be no recovery or allowance made."

In a supplemental report upon these exceptions the master found that the city issued warrants Nos. 313 to 392 inclusive, in discharge of the consideration of the agreement of sale passed before Le Gardeur, notary public, amounting to $300,000, and also issued warrants Nos. 393 to 402 inclusive, aggregating $20,000, not for work, but as a compromise for drainage taxes collected and misappropriated, as stated in the said act of sale.

Messrs. Branch K. Miller, Samuel L. Gilmore, and Frank B. Thomas for petitioner.

Messrs. Wheeler H. Peckham, Richard De Gray, J. D. Rouse, and Wm. Grant for respondents.

MR. JUSTICE BROWN delivered the opinion of the court:

1. The second assignment of error filed in the circuit court, adopting the substance of the exceptions to the master's report, raises a distinction between the drainage warrants issued for the purchase of the dredge boats, derricks, and other tangible property of the ship canal company, appraised at $153,750, and such as were issued in the purchase of the franchise and in settlement of the claim for damages urged by the canal company and Van Norden against the city of New Orleans. No such distinction, however, appears in the decree of the circuit court of appeals, affirmed by this court in 175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44, which declared that the drainage assessments set forth in the bill should constitute a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Van Norden to the city, and referred the case to a master to state an account of all the drainage assessments, before whom all warrant holders were to be notified to appear and establish their claims, without being required to file intervention or to obtain special leave of the court. Pursuant to this notice the warra nt holders did apear and presented their warrants, which were allowed. The decree did not permit of any distinction being made, and none was made, between warrants issued for the purchase of the property and such as were issued in purchase of the franchise or in settlement of damages; and it is difficult to see in what respect the master or the court departed from the decree of this court.

As the bill was brought by Warner on his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind, there was no error in permitting all

such parties to come in and prove their claims without formal interventions or special leave. All the warrants allowed belonged to the same class as Warner's and were issued upon the same consideration. This is the method commonly resorted to in bills for the foreclosure of railway mortgages, or other securities, under which bonds have been issued and are widely scattered in the hands of holders, many of whom are unknown and impossible to ascertain except by advertisement. In cases of this character, decrees are treated as decrees in favor of all in like situation as the plaintiff, who come in and claim the benefit of them. Richmond v. Irons, 121 U. S. 27, 30 L. Ed. 864, 7 Sup. Ct. Rep. 788; Brooks v. Gibbons, 4 Paige, 374; Thompson v. Brown, 4 Johns. Ch. 619; Hammond v. Hammond, 2 Bland. Ch. 362.

Doubtless the validity of these claims in the hands of holders may be examined, except so far as such validity has been already settled by the decree; but where the master upon the reference has followed the decree and enforced its directions, no objection can be taken upon appeal as to what he has done, when the appeal arises upon exceptions to his report. New Orleans v. Gaines, 15 Wall. 624, 21 L. Ed. 215. The master was powerless to entertain any objection to the decree, or any proposal for its modification. His duty was simply to carry it out according to its terms.

It should be stated in this connection that no such distinction between the different classes of warrants as is now made was called to the attention of this court when the case was here upon questions certified (167 U. S. 467, 42 L. Ed. 239, 17 Sup. Ct. Rep. 892), or upon the merits (175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44). In fact, the present exceptions to the master's report obviously involve an attempt to set up a new defense as to a part of these warrants, after the merits of the case have been fully considered and disposed of. This is impossible. Yazoo & M. Valley R. Co. v. Adams, — U. S. —, ante, 240, 21 Sup. Ct. Rep. 240; Wayne County Supers. v. Kennicott, 94 U. S. 498, 24 L. Ed. 260.

But considering the question to be still an open one, and that we are at liberty to inquire whether the court exceeded its authority in decreeing the payment of these warrants, without reference to whether they were given for the purchase of the property or franchises, or the settlement of damages, the result would not be different. It was evident there has been a claim for damages pending a long time against the city. By the act of February 24, 1871, "to provide for the drainage of New Orleans," the former boards of drainage commissioners were abolished, and their assets transferred to a board of administrators, who were "subrogated to all the rights, powers, and facilities" possessed by the commissioners. The ship canal company was authorized to undertake the work of draining the city, and by § 6 it was made the duty of the board of administrators "to locate the lines of the canals and pro-

tection levees specified in the various sections of this act, in time to prevent delay in the prosecution of the work of the said company. . . . And should the city council fail to locate the lines of said canal and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the damages resulting from such delay."

By the act of February 24, 1876, authorizing the city to control its own drainage and to purchase the property of the ship canal company, the common council was empowered "to transact and contract" with the ship canal company, and its transferee, "for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of act No. 30 of Acts of 1871; also, for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats, and apparatus belonging to said company or its transferee," etc. It will be observed that the city is invested with a double power: First, to transact and contract for the purchase and settlement of any rights, franchises, privileges, etc.; and the other for the purchase and transfer of the dredging plant. The word "transact," which seems ambiguous here, is explained by article No. 3071 of the Civil Code of Louisiana, which defines "a transaction or compromise" to be "an agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their differences by mutual consent." By the 2d clause of the section the purchase and transfer of the dredging plant was authorized.

Pursuant to this act the city surveyor was authorized by ordinance of April 26, 1876, to examine the condition and value of the dredging plant, making a report to the committee of the whole, "together with a statement of all information in the possession of his office concerning damages claimed by said . . . canal company, or transferee thereof." In compliance with this ordinance he appraised the value of the dredging plant at $153,750, and stated that the damages claimed by the transferee were for delays at various times and places, and further stated that he was unable to arrive at a conclusion as to their amount, and did not feel called upon to express an opinion, but that he had no doubt the committee, from the facts stated, would be able to arrive at a just and satisfactory conclusion. This left the common council free to settle for the damages without an appraisement. Under these circumstances the failure to appraise the damages would not vitiate their settlement.

By a further ordinance, adopted May 26, 1876, the mayor was authorized to enter into an agreement with the canal company for the purchase of its plant, and "also for the full settlement of all claims for damages, and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans of all rights, privileges, and franchises," etc., and upon the

execution of the agreement to draw upon the administrator of finance for the sum of $300,000 in drainage warrants, in full settlement, as above provided.

Conceding that the power given by the act of 1876 to transact and contract with the canal company for the purchase and settlement of all or any rights, franchises, and privileges is somewhat ambiguous as the source of a power to compromise for damages, the practical construction put upon that act by the ordinances of April 26 and May 26, 1876, as including claims for damages, is entitled to great weight, particularly in view of the long subsequent acquiescence of the city in that construction.

By the act of sale executed June 7, 1876, the canal company transferred its dredging plant to the city, as well as its franchises, privileges, contracts, and advantages, and subrogated the city to all its rights, actions, and remedies, in consideration of the sum of $300,000; and the president and secretary of the canal company, and Van Norden, their transferee, also agreed that the above amount should be in full settlement of "all existing claims for damages" which either of them "ever had, or have now, or may have, against the said city of New Orleans."

It is difficult to see how the intention of the city to settle all these claims could be made clearer, or the terms of the actual settlement more sweeping, than they were by these proceedings. What the items of damages were does not appear. As to what influences were brought to bear upon the common council to induce it to pay so large a sum as $146,250 for these damages, we are equally in the dark. Certainly we are not at liberty to impute corrupt motives to the council. The arrangement may have been an unfortunate one, but the arrangement as made is beyond doubt.

It is obviously impossible to distinguish as between these warrants, and to say that such were issued in payment of the plant, and such others for the purchase of franchises and in settlement of the damages. Granting the position taken by the city to be correct, it would result that all the warrants must be scaled down pro rata in the proportion of about 50 per cent. which would obviously be unfair to those who received purchase warrants, or there must be some attempt to classify these warrants. But as the warrants were all alike in form, no such classification is possible. It is suggested by the city that it must be considered that the warrants were issued and applied in the numerical order of their execution: First, for the payment of the price of the property purchased; next, for the claim for the settlement of damages; and lastly, for the payment of work mentioned in the said notarial act. But this would result in the rejection of the Warner warrants, which were expressly allowed by the decree of this court to the amount of $6,000, since it appears by the report of the master that the warrants issued to Warner and allowed by

such decree were Nos. 379, 380, and 381, and did not fall among the first $153,750 issued, but were payable long after this amount, appraised as the value of the plant, had been exhausted. It would also result in the disallowance of certain warrants to Wilder & Company, upon which a judgment at law was recovered on May 24, 1898, after the case had been remanded from the circuit court of appeals. Obviously the position of the city in respect to these warrants is untenable.

2. The only other item to which exception is taken is one of $20,000, for which warrants Nos. 392 to 402 inclusive were issued as a compromise of drainage taxes collected by the city and misappropriated. These were in excess of the $300,000 allowed in payment of the plant and various claims of the canal company, and were especially provided for in the act of sale as follows: "That inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of $20,000 in drainage warrants in full satisfaction of the same."

The authority to include this in the act of sale is questioned by the city, but we think it comes within the 1st section of the act of 1876, which provides for "the purchase and settlement of all or any rights . . . arising in favor of said ship canal company or said transferee" under the act of 1871 and within the ordinance of May 26, to which allusion has already been made, which provides for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans of all rights . . . arising in favor of the canal company." Money collected by the city, applicable to the drainage funds, and appropriated to the general funds of the city, manifestly creates a right in favor of the canal company to a restoration of the amount. If there were doubt of the proper construction of these words the long acquiescence of the city and the failure to raise an objection to this claim until after final decree is sufficient to put the matter at rest.

The decree of the Circuit Court of Appeals is affirmed.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM took no part in this case.

MAYOR, ETC., OF CITY OF WAYCROSS *et al.* *v.* HOUK.

(*Supreme Court of Georgia, July 20, 1901.*)

[39 S. E. Rep. 577.]

Sewers—Nuisance*—Injunction.*—Although municipal authorities may have plenary powers in the matter of establishing a sewerage system for a city, they cannot lawfully create, in connection therewith, a nuisance dangerous to life or health; and, when necessary and proper, a

*See notes at end of case.

court of equity will, at the instance of a citizen injuriously affected thereby, enjoin the maintenance of the same.

Same—Same—Liability of City for Sewers under Control of Local Board.*—While, in the present case, a local board of commissioners may have had exclusive control over the sewerage system of the city, it was nevertheless, the duty of the mayor and council to abate a nuisance such as that complained of, and they were properly held accountable for the maintenance thereof, notwithstanding they may not have been responsible for its creation.

(Syllabus by the Court.)

Error from superior court, Ware county; Joseph W. Bennet, Judge.

Action by Virginia W. Houk against the mayor and council of the city of Waycross and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Leon A. Wilson and John C. McDonald, for plaintiffs in error.

Toomer & Reynolds, for defendant in error.

LUMPKIN, P. J. The plaintiff below, Mrs. Virginia W. Houk, filed an equitable petition against the sanitary and waterworks commissioners of the city of Waycross and the mayor and council of that city, the main purpose of which was to enjoin the defendants from continuing the location of the mouth of the main sewer of the city at a designated point near her premises, or from extending it, as was contemplated, so that the sewerage would be discharged directly upon her land. In this connection she alleged that the main sewer emptied into a small stream within about 600 feet of her premises, which was wholly incapable of carrying off the vast quantity of sewerage discharged into it, and as a result the atmosphere of the neighborhood was permeated with "noxious gases, noisome odors, pestilential stenches, poisonous vapors," etc., which were dangerous to health, and caused sickness among her tenants. She further alleged that her damages would be irreparable if this state of affairs was permitted to continue, or matters were made worse by the proposed extension of the sewer, and the discharge of its filth into a ditch which ran for half a mile through her lands. The commissioners demurred to the plaintiff's petition on various grounds to the effect that, under the facts set forth, she was not entitled to the equitable relief sought. The mayor and council demurred on the ground that they were improperly joined as defendants, for the reason that, as shown by legislative acts referred to in plaintiff's petition, the board of commissioners alone had control and supervision of the sewerage system of the city, and its mayor and council, therefore, had "no interest in the subject-matter in controversy." Separate answers were also filed by these two defendants. The evidence introduced on the interlocutory hearing was voluminous and conflicting, and, after considering the same in the light

*See notes at end of case.

of the issues raised by the pleadings, his honor of the trial bench granted an injunction as prayed for. To this action on his part the defendants excepted. The questions presented by the bill of exceptions sued out in their behalf will be briefly dealt with below.

1. We have no hesitancy in holding that under the facts alleged in the plaintiff's petition she was entitled to the equitable relief sought. In Butler v. Mayor, etc., 74 Ga. 570, it was distinctly ruled that: "When a municipal corporation is proceeding to lay sewers, and discharge filthy sewage upon the land of a property owner, which may probably cause injury to his health and sickness in his family, and where the nuisance is continuing, and likely to be permanent, and the consequences are not barely possible, but to a reasonable degree certain, a court of equity may interfere to arrest such nuisance before it is completed." And in City of Atlanta v. Warnock, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, 44 Am. St. Rep. 17, this court decided that there was no abuse of discretion in granting a temporary injunction enjoining the city from continuing to maintain a nuisance already created. The nuisance complained of in that case consisted of "openings called 'manholes' in a sewer located in a public street contiguous to the dwelling of a citizen, the manholes being allowed to emit poisonous gases in large quantities through perforated covers placed over them." A general grant of power to establish in a city a sewerage system does not carry with it any right on the part of a municipality to create and maintain a nuisance dangerous to life or health. Holmes v. City of Atlanta (this day decided) 39 S. E. —. Certainly, therefore, a flagrant abuse of power on the part of municipal authorities may, upon a proper petition filed by one having a a peculiar interest in the matter, be enjoined before irreparable injury ensues. The evidence relied on by the plaintiff in the present case was such as to authorize the granting of the injunction prayed for.

2. It is insisted, however, that, even if this be true as to the commissioners, the court erred in not holding that the mayor and council were improperly joined as defendants, for the reasons stated in the demurrer filed by them. Reliance is placed upon the decision of this court in Griffin v. Railroad Co., 72 Ga. 423, as authority for the proposition that "a demurrer only admits such facts as are well pleaded, and, where the bill alleges facts as true which are contradicted by the legislative acts and records, of which the court is bound to take judicial notice, it cannot hold such facts to be true, and they will not prevent the sustaining of the demurrer." It is accordingly urged that the trial judge should have taken judicial cognizance of the fact that the legislative acts referred to in the plaintiff's petition conferred upon the commissioners exclusive control over the sewer system of the city, and its mayor and council were clothed with no power and charged

with no duty in the premises. A careful consideration of the allegations of the petition convinces us that, conceding the doctrine thus invoked to be perfectly sound, it had no real application to the present case. The alleged nuisance was one wholly within the corporate limits of the city, and it had sole power to abate it, acting through its mayor and council, and not through its board of commissioners. See Smith v. City of Atlanta, 75 Ga. 110. The plaintiff distinctly charged that, instead of complying with their official duty in the premises, the mayor and council actually refused to abate the nuisance, and acted in conjunction with the commissioners in maintaining the same. If this be true, it cannot be seriously doubted that, without respect to how or by whom the nuisance originated, the mayor and council cannot lawfully be permitted to sanction it, and keep it in existence, as the plaintiff undertook to allege, and actually proved to the satisfaction of the court below. For aught that appears, the granting of the injunction against them was eminently proper, and they have no cause of complaint that the trial judge held them accountable for the maintenance of the alleged nuisance, notwithstanding they may not have been responsible for its creation. Judgment affirmed. All the justices concurring.

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DEFECTIVE SEWERS—SEWERS BECOMING A NUISANCE.

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I. GENERAL PRINCIPLES.

The controlling principle governing municipal liability for torts arising in connection with drains and sewers rests upon the fundamental distinction between those functions which are legislative or judicial in their nature, involving the exercise of almost unlimited discretion, and those which are ministerial or absolute, or which concern the municipality in the exercise of its functions as a private corporation. While there are some widely recognized exceptions, it is well nigh the universal doctrine that the duty to provide sewers and the devising of plans therefor, belong to the former class. Hence it follows that as a general rule the exercise of that discretion in providing, or in failing to provide, sewers is subject to no revision by court or jury. And not only is it under no obligation to provide sewers, but it is subject to no liability in case those it has provided prove inadequate to meet the demands made upon them. Thus it is laid down: "A city is not bound to construct a drain of any kind, and by no system of reasoning can it be made to appear, that, if it shall construct a drain, it must construct one that shall be sufficient in all cases and for every emergency." City of Atchison *v.* Challis, 9 Kan. 603.

And again a municipal corporation is not liable for a failure to provide inlets to a sewer where those at first provided were sufficient, but have since become insufficient by reason of the increase of population and the greater extent of territory graded and built upon. Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342.

That a city is not liable for injuries resulting from the want of sewers, or because of insufficient sewers, see generally, Springfield *v.* Spence, 39 Ohio St. 665, 2 Am. & Eng. Corp. Cas. 620; Henderson *v.* Minneapolis, 32 Minn. 319, 6 Am. & Eng. Corp. Cas. 4; Freburg *v.* Davenport, 63 Iowa 119, 50 Am. Rep. 737; Gift *v.* Reading, 3 Supr. Ct. (Pa.) 359; Woods *v.* Kansas City, 58 Mo. App. 272. Nor is the municipality liable even though experience has demonstrated the incapacity of the sewer to carry off even ordinary rains, and the city has had notice thereof. Hession *v.* Wilmington, 27 Atl. Rep. 830, 40 Atl. Rep. 749; Bealafeld *v.* Borough of Verona, 188 Pa. 627, 41 Atl. Rep. 651.

In Schreiber *v.* City of New York, 32 N. Y. S. 744, 11 Misc. Rep. 551, the overflow was caused by strainers placed at the sewer openings to keep out trash, and to curves in the sewer which impeded the flow of the water. *Held*, that as the defect was in the plan and not in the construction or maintenance, the city was not liable.

And in Van Pelt *v.* City of Davenport, 42 Iowa 308, 20 Am. Rep. 622, the defendant municipality extended a street across a ravine, and constructed a culvert under it to carry off the waters of the ravine. The culvert was planned by a competent engineer, but owing to an error of his judgment it proved insufficient to meet all the demands made upon it. It was held that the city was not liable to one who had been injured by its overflow, especially when the plaintiff, by the exercise of a little prudence and at a small expense could have protected himself.

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The case of Garratt *v.* Trustees of Canandaigua, 135 N. Y. 436, 32 N. E. Rep. 142, although not an action of tort, turned upon the question of the city's liability for defects resulting from errors of judgment in devising a sewerage plan. The facts were as follows: The village, proceeding under legislative authority, emptied its sewage into the outlet of a lake, which outlet it had cleared out and deepened with the expectation that the increased rapidity of the flow would drain certain submerged lands along the channel and prove otherwise beneficial. Upon this theory an estimate was made of the benefits, which it was expected would accrue to the owner of such lands, and an assessment levied. Plaintiff's complaint was that he had paid his assessment, which was a large one, but had received no benefit, as his lands were still submerged, owing to the action of the village in keeping the floodgates at the head of the outlet wide open. It was held that the injury, if any, was the result of a faulty plan adopted in good faith; and that as to the assessment, plaintiff having failed to object at the time and in the manner provided by the statute, it would be presumed to have been fair, and no action would lie to abate it. See further on the subject of the nonliability of cities for defective plans, Wilson *v.* Mayor of New York, 1 Denio 595; Mills *v.* City of Brooklyn, 32 N. Y. 489; Town of Sullivan *v.* Phillips, 110 Ind. 320; Rozell *v.* City of Anderson, 91 Ind. 591, 4 Am. & Eng. Corp. Cas. 622; Bear *v.* City of Allentown (Pa.), 23 Atl. Rep. 1062; Harrigan *v.* City of Wilmington (Del.), 12 Atl. Rep. 779; Castello *v.* Conshohocken, 8 Pa. Co. Ct. Rep. 639; Fair *v.* City of Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455; Smith *v.* Gould, 61 Wis. 31, 5 Am. & Eng. Corp. Cas. 472; Beach *v.* Scranton (Pa.), 5 Lack L. R. 25; Hession *v.* Mayor of Wilmington (Del.), 27 Atl. Rep. 830, 40 Atl. Rep. 749; Cummins *v.* City of Seymour, 79 Ind. 491, 41 Am. Rep. 618; Seymour *v.* Cummins, 119 Ind. 148, 5 L. R. A. 126; Johnson *v.* Dist. of Columbia, 118 U. S. 19, 6 Sup. Ct. Rep. 923.

II. DOCTRINE OF LATER CASES.

Negligence in Devising Plans.—While the above may be said to be the prevailing doctrine, yet it has always been subject to qualifications, and the later cases indicate that the judicial mind in many, perhaps a majority of jurisdictions in this country, is undergoing a change, and the strict doctrine of nonliability for injuries resulting from defects in the plan of sewers is being modified by the engrafting of further exceptions and limitations. Indiana and one or two other states, while maintaining that there is no liability for defects which are the result of mere *errors of judgment*, have always made a distinction in those cases where the municipality has been guilty of *negligence* in selecting or adopting the plan.

Thus where plaintiffs owned a soap factory situated upon the side or bank of a ravine, through which in wet weather water was accustomed to flow into the creek below, the county, in the course of time, constructed a road across the ravine, building an embankment across it, and providing for the escape of the water by means of a culvert under the embankment. After the road had become a city street, the municipality removed the culvert, replacing it with a sewer of such inadequate size that plaintiffs' premises were flooded by the backwater during every considerable rain. In an opinion holding the city liable, the court said: "A single objection is urged against the complaint. The appellant's counsel assert that it is defective because it shows that the only unskillfulness or negligence on the part of the corporate officers was in devising the plan of the sewer. The objection cannot prevail. It is well settled that a municipal corporation is liable for negligence in devising a plan for a sewer as well as for negligence in carrying the plan into execution." City of Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86.

In regard to what would be considered negligence in such case, it is held to be negligence for men unskilled in the business of prepar-

ing plans for sewers to act upon their own judgment in cases where skill is required. Bradbury *v.* Goodwin, 108 Ind. 286, 9 N. E. Rep. 302; City of Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. Rep. 686. But negligence will not be inferred from the mere fact that the plan is defective and that the drains have become stopped with sand and dirt. City of Peru *v.* Brown, 10 Ind. App. 597, 38 N. E. Rep. 223.

In Cummins *v.* City of Seymour, 79 Ind. 491, 41 Am. Rep. 618, plaintiff set forth in his declaration that the city had constructed a large open ditch in front of his premises, which were without the city limits, and had created a nuisance by discharging ill-smelling and offensive sewage therein, and had deprived him of the use of the highway by obstructing it with the dirt thrown from the ditch. The decision was in favor of the city upon the ground that the complaint alleged no negligence in the adoption of the plan, and that so far as the evidence showed, the work had been done with reasonable care and skill. But in Seymour *v.* Cummins, 119 Ind. 148, 5 L. R. A. 126, which seems to have been an action brought by the representatives in interest of the plaintiff in the former suit, for injuries arising from the construction and maintenance of the same ditch, the city was held liable on the ground that it had been negligent in devising the plan of the ditch. See also, Rice *v.* City of Evansville, 108 Ind. 7, 58 Am. Rep. 22; City of Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. Rep. 686; Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. Rep. 800; North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. Rep. 821; Crawfordville *v.* Bond, 96 Ind. 236; Weis *v.* City, 75 Ind. 241, 39 Am. Rep. 135; City *v.* Huffer, 30 Ind. 235; Stackhouse *v.* City, 26 Ind. 17; City *v.* Wright, 25 Ind. 512; New Albany *v.* Ray, 3 Ind. App. 321, 29 N. E. Rep. 611.

In Iowa a municipal corporation is held to the exercise of ordinary care and prudence in adopting the plan of a system of sewers. German Theological School *v.* City of Dubuque, 2 Am. & Eng. Corp. Cas. 625.

In Illinois the city of Peoria was held liable for damages resulting from the overflow of a sewer where it had negligently constructed it of a size wholly inadequate to carry off the surface water flowing into it. Peoria *v.* Eisler, 62 Ill. App. 26. And in Litchfield *v.* Southworth, 67 Ill. App. 398, where the city had constructed a sewer and compelled the abutting owners to pay assessments therefor, it was held liable for constructing it of such inadequate size and insufficient fall that it failed to carry off even an ordinary rainfall.

Plan Must Be Reasonable.—In another line of cases the criterion seems to be the reasonableness of the plan adopted. Obviously the objection to such a test is that it must be varying and uncertain according to the opinions of different courts and juries. In a case like that of Papineau *v.* Longuenil, Rap. Jud. Quebec, 11 C. S. 98, where a fifteen inch sewer was made to discharge into an already surcharged twelve inch sewer, probably all men would agree that the plan was unreasonable; but between this case and that of a sewer planned and constructed wholly adequate for all demands made upon it, there is necessarily a wide range of uncertainty.

In Uppington *v.* New York, 41 App. Dec. 370, 58 N. Y. Supp. 533, it is said that the failure to adopt the very latest and most improved plan of sewerage is not negligence; and the corporation will not be liable for injuries resulting from defects in the plan adopted so long as such plan is reasonably safe and has the sanction of usage.

And so where a city undertakes to build a sewer it is its duty to provide a proper outlet, and if it fails in this duty by neglecting to acquire the right to repair a sewer built on private property, it cannot be heard to urge the want of such right as a defence. Netzer *v.* City of Crookston (Minn.), 61 N. W. Rep. 21.

In Tate *v.* City of St. Paul (Minn.), 58 N. W. Rep. 158, it is said, that though the defect in the sewer be of legislative origin, yet where it is clearly demonstrated by experience, after sufficient trial, that the sewer is, under ordinary conditions, insufficient for its purpose, the

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city is liable for maintaining it. And to the same effect, see Hitchins *v.* Town of Frostburg, 68 Md. 100, 11 Atl. Rep. 826; Frostburg *v.* Hitchins, 70 Md. 56, 16 Atl. Rep. 380; Seamen *v.* City of Marshall, 116 Mich. 327, 74 N. W. Rep. 485; Haney *v.* Kansas City (Mo.), 7 S. W. Rep. 417; Medicine Co. *v.* Montreal, Rap. Jud. Quebec, 15 C. S. 594. *Contra*, Hession *v.* Mayor of Wilmington (Del.), 27 Atl. Rep. 830, 40 Atl. Rep. 749; Knostman, etc., Co. *v.* City of Davenport, 99 Iowa 589, 68 N. W. Rep. 887; Bealafeld *v.* Borough of Verona, 188 Pa. 627, 41 Atl. Rep. 651.

Nuisance—Invasion of Private Property.—With a few exceptions the cases are almost unanimous in holding the corporation liable whenever the use of the sewers according to the adopted plan results in an invasion of private property or in the creation of a nuisance.

Thus in pursuance of a general plan of sewerage for the drainage of a district embracing twenty-three hundred acres of land, a city constructed a main sewer into which it proposed to run lateral branches. After the construction of a few of the lateral branches it became apparent that the main sewer was inadequate for the demand made upon it; and as the construction of lateral branches continued, overflows became more frequent. Notwithstanding the fact that the city had knowledge of the inadequate size of the sewer, it continued to construct lateral branches. In defence to an action for damages done by the overflow, the city invoked the doctrine exempting municipal corporations from liability for damages occasioned through the exercise of judicial functions; but in an opinion holding it liable, the court approves the following language: "As to the necessity for a sewer, or its location, or the system or plan of sewerage, the decision of the proper municipal is conclusive, because it is the exercise of a discretion reposed in them by law, and consequently is not reviewable by the courts; but if in the selection of a location it unnecessarily creates a nuisance, it is responsible therefor." Seifert *v.* City of Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664.

And so where the necessary result of cutting a sewer was to collect and throw upon the premises of the plaintiff large quantities of water which otherwise would not have found its way there, it was held to be an excess of jurisdiction, for a city cannot be permitted even in the exercise of its judicial discretion to create a nuisance to the injury of an individual. Ashley *v.* City of Port Huron, 35 Mich. 296, 24 Am. Rep. 552.

And so in Chalkley *v.* City of Richmond, 88 Va. 402, 29 Am. St. Rep. 730, where owing to a defect in the plan of a sewer, plaintiff's property and business were injured by the leakage of sewage into his cellar, the court recognizes the doctrine that ordinarily a city will not be liable for injuries resulting from defects in the plan of its sewers; yet where the working of the plan results in a nuisance, it is an excess of jurisdiction and the corporation is liable.

And so statutory authority to construct, use, and manage a system of sewers does not authorize the creation of a nuisance by the discharge of filth upon or near the premises of a private owner. Such a nuisance is an invasion of private rights in violation of every rule of law, and can only be permitted after condemnation of the property affected and compensation therefor. Carmichael *v.* City of Texarkana, 94 Fed. Rep. 561; Bacon *v.* City of Boston, 154 Mass. 100, 28 N. E. Rep. 9.

In City of Jacksonville *v.* Lambert, 62 Ill. 520, the court says, in substance, a city has no right to collect all the dirty water, swill, putrid matter, and garbage of the city, or any portion thereof, and discharge it in the dooryards of a portion of the inhabitants. Nor would it be in the slightest degree either a defence or an excuse, to show that such sewer or drain was constructed of the best material, and the work performed in the most skillful manner, and the plan on the most approved model. If it is a public nuisance and there is no means of making proper drainage without injury to individuals, let the community for whose benefit it is constructed, through their cor-

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porate government, by condemnation or otherwise make compensation. And see Loughran *v.* Des Moines (Iowa), 34 N. W. Rep. 172; City of Bloomington *v.* Murnin, 36 Ill. App. 647.

And in Connecticut it is said an act done by a corporation, lawful in itself, yet performed in such a manner as to create a nuisance, will render the corporation liable in the same manner that an individual would be. Judge *v.* Meriden, 38 Conn. 90; R. R. Co. *v.* Norwalk, 37 Conn. 109; Mootry *v.* Danbury, 45 Conn. 550. And where the plan as carried out leaves a hole in the street, rendering it unsafe and dangerous to travel, it is the duty of the city to remedy the defect, and it will be liable to any one injured by its failure to do so. Chicago *v.* Seben, 165 Ill. 371, 46 N. E. Rep. 244.

And so if a nuisance is established by carrying the sewage of an incorporated town or city in a drain or sewer beyond corporation limits, an injunction will lie at the suit of any person injured thereby. Robb *v.* LaGrange, 158 Ill. 21, 42 N. E. Rep. 77. A city has no right to empty the contents of a sewer at a point either in or outside of the city where it may endanger the health or life of a citizen. Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. Rep. 878.

In Noonan *v.* City of New Albany, 79 N. Y. 470, 35 Am. Rep. 540, where the municipality collected surface water and sewage from a large area and turned it into a small stream, causing it to overflow and deposit noxious matter on plaintiff's premises, creating a nuisance, the city was held liable, the court basing its decision upon the doctrine that an upper proprietor has no right to collect the surface water into artificial channels and discharge it upon the lands of another, and that a city, no more than an individual, has any right to create and maintain a nuisance.

The corporation cannot lawfully maintain a system of sewers which change the natural flow of surface waters, and yet prove inadequate to carry off the sewage and surface water under ordinary conditions, so that a nuisance results to the property of adjacent owners. Martin *v.* Brooklyn, 52 N. Y. Supp. 1086, 32 App. Div. 411; Daggett *v.* City of Cohoes, 7 N. Y. S. 882.

And in New York Cent., etc., R. Co. *v.* City of Rochester, 127 N. Y. 591, 28 N. E. Rep. 416, it is said that the discharge of sewage upon private property is a nuisance, and the right to do so can be acquired only by the consent of the owner or by prescription.

And so where a ditch used for sewerage purposes is constructed with no outlet, so that the water therein becomes stagnant and gives rise to a nuisance, the city is liable. Hamilton *v.* Columbus, 52 La. 435.

And so if the sewer discharges offensive matter upon or near a farm in such quantities as to materially interfere with the cultivation thereof and affect the health of the persons living thereon, it is a nuisance which may be abated by injunction. Dierks *v.* Com'rs of Addison Twp., 142 Ill. 197, 31 N. E. Rep. 496.

The construction of drains and sewers in such a manner that plaintiff's premises are overflowed, his well polluted, and the health of himself and family injured, is a nuisance, and he may recover damages for the injuries sustained. Maguire *v.* City of Carterville, 76 Ga. 84.

The fact that sewers are necessary to a city and that the statute directs that they shall follow as near as practicable the natural drainage of the country, affords no justification to the action of the city in emptying its sewers on the land of an individual. Smith *v.* Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907.

And so where the owner of land over which a public highway ran owned a tail race which ran through a culvert under the highway, and a municipal corporation constructed a sewer running under the highway and lengthways thereof, and terminated it in plaintiff's tail race at the point where it passed through the culvert, it was held that as the owner of the land was also the owner of the fee under the highway, and that as the city had no right to terminate the sewer on

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her land, she was entitled to maintain her action for damages. Nevins *v.* Fitchburg, 174 Mass. 545, 55 N. E. Rep. 321, 47 L. R. A. 312.

And where experience has demonstrated that sewers built according to the specifications of a certain plan are insufficient in size, and result, under ordinary conditions, in overflowing the private property of adjacent owners, the continued use thereof is not negligence, but the city will be liable for injuries resulting from such use if it amounts to a positive invasion of private property. Knostman, etc., Co. *v.* City of Davenport, 99 Iowa 589, 68 N. W. Rep. 887.

And in Tate *v.* City of St. Paul (Minn.), 58 N. W. Rep. 158, it is said, where a sewer, as originally planned and constructed, is found to result in direct physical injury to the property of another, which from its nature is liable to be repeated and continuous, but is remediable by change of plan or the adoption of prudent measures, the corporation is liable for such damages as occur after notice and failure to use ordinary care to remedy the evil.

And where the plan adopted made no provision for safety valves, or flood gates, over the mouth of the sewers in order to prevent the flooding of private property whenever the water in the river should rise higher than the head of the sewers, and private property was flooded at such a time, the city was held liable for the resulting damage regardless of any question of negligence, for it was a direct invasion of private propery. King *v.* Kansas City, 58 Kan. 334, 49 Pac. Rep. 88.

And so where the plan of a new sewer was changed under the orders of one of the city aldermen in order to connect it with another sewer, and the change was ratified by the city in paying for the additional work, the latter was held liable for injuries resulting from the insufficiency of the sewer. Munk *v.* City of Watertown, 22 N. Y. S. 227, 67 Hun 261. See also, Dent *v.* Boursemouth Corp., 66 L. J. Q. B. N. S. 395.

And where sewers are constructed so that they deposit mud and gravel in the private raceway of a manufacturing concern, obstructing the flow of the water therein, it is liable to the proprietors for the amount expended in cleaning the same. Elgin, etc., Co. *v.* Elgin, 74 Ill. 433.

And so where injury was caused by sewage flowing through places left open in a sewer, such places being a part of the plan of the sewer. Lehn *v.* San Francisco, 66 Cal. 76, 4 Pac. Rep. 965. It is the settled law in California, however, that in the absence of statute a municipal corporation is not liable for personal injuries sustained by individuals falling into sewer excavations left unguarded at night. Winbigler *v.* Los Angeles, 45 Cal. 36; Tranter *v.* Sacramento, 61 Cal. 275; Barnett *v.* Contra Costa County, 67 Cal. 77; Crowell *v.* Sonoma County, 25 Cal. 315; Huffman *v.* San Joaquin County, 21 Cal. 430.

And where a city graded its streets so as to turn additional surface water into an ordinarily adequate sewer, thereby causing it to flood private property, it was said that a city cannot so change the plan which it adopted when the sewer was built as to render it a nuisance. King *v.* Granger, 21 R. I. 93, 41 Atl. Rep. 1012. And see Baxter *v.* Tripp, 12 R. I. 318; Inman *v.* Tripp, 11 R. I. 520. Also, Nevis *v.* Mayor, etc., of Troy, 59 N. Y. 500; Elliott *v.* City of Oil City, 129 Pa. 570, 18 Atl. Rep. 553; Gillett *v.* Trustees of Kinderhook, 28 N. Y. S. 1044, 77 Hun 604; Beach *v.* City of Elmira, 11 N. Y. S. 913, 58 Hun 606.

The case of Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463, is one that presents some difficulty. The court recognizes the doctrine that for injuries resulting from the negligent performance or non-performance of ministerial duties a city will be liable, and will be exempt from liability for injuries resulting from the exercise of judicial or quasi-judicial discretion; but it seems to have queer ideas as to what acts are ministerial and what are judicial. The facts of the case were, that the city had reconstructed a culvert sewer, and acting on the advice of an incompetent, uneducated, and unskilled

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engineer, had moved it to what proved to be an improper location, some distance from the site of the original sewer, and then constructed it of an entirely inadequate size, and with crooks and angles which impeded and checked the flow of such water as it otherwise would have carried off without overflow. There was evidence also of some negligence in the execution of the plan. The court discusses various grounds of liability, but taking the decision as a whole, there can be no doubt that the judgment is based upon the court's first proposition, namely, that the city was liable for its negligence in selecting the incompetent engineer who planned the sewer as reconstructed.

Rights of Wharf Owners.—In regard to public navigable waters, it is well nigh the universal doctrine that regardless of any question of negligence, a municipal corporation has no right to empty its sewers at a point where the discharge will create a nuisance, interfering either with public navigation or with the use of private wharves and docks. Thus in the old case of Barron *v.* Mayor of Baltimore, 2 Am. Jur. 203, the question was as to the right of the city, for the purpose of drainage, to conduct certain streams into the docks of the appellants, thereby causing large quantities of earth, sand, etc., to be deposited near the appellant's wharf, lessening the depth of the water and impairing access to the wharf. The chief justice, in a well argued opinion, held that the easement of access to plaintiff's wharf was as much property as the wharf itself, and the city could not injure or destroy it without making just compensation. And in a case prosecuted against the city of Portland, for creating a public nuisance, it was said: "A city must at its peril make the outfall of its sewers where the deposits from them will be promptly removed by the reflux of the tides, so that they will not create a nuisance, either to public health or the right of navigation, or they must provide for their speedy removal in some other mode." State *v.* City of Portland, 74 Me. 268, 43 Am. Rep. 586.

And so if a municipality be authorized by statute to construct a sewer with its outfall in a public tidewater dock, the authority must be so exercised as not to create a nuisance to navigation, either by filling up the dock with mud, filth, and debris discharged by the sewer, or by creating noxious and unwholesome vapors dangerous to the public health. Franklin Wharf Co. *v.* Portland, 67 Me. 46, 24 Am. Rep. 1. But see Attwood *v.* Bangor, 83 Me. 582, 22 Atl. Rep. 466, where it was held that if the damage done to plaintiff's wharf and dock was due to the improper location of the sewer, or any error of judgment of the city officials acting in their judicial or governmental capacity, the plaintiffs could not recover. In that case, however, the plaintiff's allegations as to damage were not sustained by the evidence.

And in Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. Rep. 800, the defendant municipality was held liable for discharging its sewers so near plaintiff's dock that filth and sediment were deposited therein, rendering it less accessible to vessels and giving rise to offensive odors; and it was said that the right to discharge sewage into public navigable waters did not include the right to create a public nuisance to the injury of commerce and navigation, nor could such right be acquired by prescription.

In Pennsylvania, under section 8, article 16, of the state constitution, providing that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements," the city of Philadelphia was held liable to the owners of a wharf for constructing a sewer so that the discharge therefrom obstructed the dock alongside the wharf, creating a nuisance therein, and preventing vessels from entering. Butchers' Ice & Coal Co. *v.* City of Philadelphia, 156 Pa. 54, 27 Atl. Rep. 376.

Under the common law of Massachusetts the owners of lands bordering on tidewater own the space between high and low water marks,

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subject to the right of the public to use the same for purposes of navigation, while the tide is in, until the same shall have been redeemed, either by filling in, or by the erection of wharves, seawalls, or other structures. Hence the city of Boston, owning the fee of a strip which extended out to deep water between two private wharves, and which was used by the wharf owners as a dock, was not liable to them for destroying its usefulness as a dock by constructing a sewer therein. It was said, however, that the city would be liable if the sewer so constructed was not carried out sufficiently far to discharge its contents where they would be swept off by the tides, but caused an accumulation of matter at the outer end of plaintiff's wharves, insomuch that vessels could not approach them with the same depth of water as formerly. Richardson *v.* City of Boston, 19 How. 263, 60 U. S. —. Neither the city nor any private person has the right to deposit filth upon the seashore in such quantities as to create a nuisance to health or navigation. Nor does the right conferred upon a city to lay out common sewers through any streets or private lands include the right to create a nuisance, public or private upon the property of the commonwealth or of an individual within tidewater. Haskell *v.* New Bedford, 108 Mass. 208. See also, Brayton *v.* Fall River, 113 Mass. 218, 18 Am. Rep. 470; Constitution Wharf Company *v.* City of Boston, 156 Mass. 397, 30 N. E. Rep. 1134; Breed *v.* Lynn, 126 Mass. 367; Clark *v.* Peckham, 10 R. I. 35, 14 Am. Rep. 654.

But see *contra*, Sayre *v.* Newark (N. J.), 48 L. R. A. 722, where it is held that the owner of a dock befouled by the discharge of sewage into a public stream cannot restrain the nuisance by injunction, for the reason that the bed of a public stream belongs wholly to the state, and that any pollution of its waters by a municipality acting under legislative sanction and keeping within the limits of its authority, is *damnum absque injuria*.

Pollution of Streams—Water Rights.—By the weight of authority the pollution of the waters of natural streams, mill ponds, etc., by the discharge of sewage therein, is an actionable wrong, and especially so if the discharge complained of not only contaminates the stream, but creates a nuisance injurious to mill owners or offensive to residents along the watercourses. Thus, in Lind *v.* City of San Luis Obispo, 109 Cal. 340, 42 Pac. Rep. 437, the defendant city was held liable for maintaining a cess pool which overflowed into a natural stream and created a nuisance by depositing offensive matter upon private premises whenever it was flushed.

And in Connecticut a municipal corporation is liable for a nuisance created upon the land of a private owner by deposits of sewage cast thereon by the waters of a brook flowing through the same. Watson *v.* Town of New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. Rep. 345. And the statutory right to pour surplus drainage into a river does not include the right to mix with that drainage noxious substances in such quantity that the river cannot dilute them nor safely carry them off without injury to the property of others. Platt *v.* Waterbury, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335.

In that state, at least, statutes authorizing the use of streams for sewer purposes are construed very strictly. Thus the act of 1872, authorizing the city council of New Britain "to appropriate any stream or part of a stream within its limits for sewer purposes whenever the public health of the city should require such appropriation," etc., was held to give the city no authority to do anything affecting property outside of city limits, or to affect any person not an inhabitant or property owner within those limits; and hence the city was liable for the creation of a nuisance upon property through which the brook flowed below the city. Nolan *v.* City of New Britain, 69 Conn. 668, 38 Atl. Rep. 703. See also, Morgan *v.* Danbury, 67 Conn. 484, 35 Atl. Rep. 499.

In Illinois the right to create a nuisance by discharging sewage into a small stream can be acquired only by grant or prescription. Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. Rep. 218.

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In Massachusetts, in Merrifield *v.* City of Worcester, 110 Mass. 216, 14 Am. Rep. 592, it was said that if the injury to plaintiff's boilers and machinery, which had been damaged by the pollution of the stream, was occasioned by any reasonable use which the defendant municipality might have made of the stream, or was the result of the plan of sewerage adopted by the city, he could not recover; but if it was due to improper construction and unreasonable use of sewers, he could recover.

And where the legislature authorized the city of Worcester to construct sewers or to use any natural stream as a sewer, it was held that it was not intended to authorize the city to so construct its sewers or to so use the stream as to create a nuisance; and that if possible, by the use of any reasonable means, the corporation must so construct its system as to avoid creating a nuisance, otherwise it would be liable for any injury done to private property. Morse *v.* City of Worcester, 139 Mass. 389, 2 N. E. Rep. 694.

The pollution of the waters of a canal owned by a private company is an injury to private property for which the municipality is of course liable. Merrimac River Canal Proprietors *v.* Lowell (Mass.), 7 Gray 223.

In Minnesota, see O'Brien *v.* St. Paul, 18 Minn. 176; Kobs *v.* Minneapolis, 22 Minn. 159.

In Vale Mills *v.* Nashua, 63 N. H. 136, the corporation was held liable for discharging a public sewer into a private millpond and upon the land of the owner.

In New York a municipality has no right to destroy a natural water course by discharging sewage into it. Butler *v.* Village of Edgewater, 6 N. Y. S. 174; Chapman *v.* City of Rochester, 110 N. Y. 273, 6 Am. St. Rep. 366, 1 L. R. A. 296.

And where before the introduction of waterworks the city had used an open stream flowing through plaintiff's premises as a storm sewer, and after the introduction of waterworks, many private persons, without the knowledge or consent of the city, connected their closets with the stream and discharged their sewage therein, the city was held liable for the nuisance so created. Demby *v.* City of Kingston, 14 N. Y. S. 601. So where the city constructed a sewer intersecting a natural watercourse flowing through plaintiff's land without providing any escape for the water so obstructed, it was held liable for the resulting overflow. Donohue *v.* Mayor of New York, 3 Daly 65.

In Ohio it is held that the creation of a nuisance by the discharge of sewage into a stream is an injury to the riparian proprietor for which an action will lie. City of Mansfield *v.* Hart, 19 Ohio Cir. Ct. Rep. 488, 10 O. C. D. 567.

In Pennsylvania a municipality may connect its sewers with any natural stream of water. Munn *v.* Pittsburgh, 40 Pa. St. 364. But when a stream is used for such purpose the obligation to keep it clean and free from obstructions is said to be a plain municipal duty, the right to neglect which cannot be acquired by prescription. Owens *v.* City of Lancaster, 182 Pa. 257, 37 Atl. Rep. 858; Blizzard *v.* Borough of Danville, 175 Pa. St. 479, 34 Atl. Rep. 846. And in Good *v.* City of Altoona, 162 Pa. 493, 29 Atl. Rep. 741, the corporation was held responsible for injuries resulting from the pollution of a stream which flowed partly underground, the court basing its decision on the right of the lower proprietor to have the stream flow through his premises in its natural and unpolluted condition.

In Indiana the doctrine seems to be that legislative authority to construct a sewer system carries with it the right to discharge the sewers into any natural stream regardless of the consequences of contamination. Thus in a case where plaintiffs owned a woolen mill situated on the stream a short distance below the city, and used its waters in washing and dying their wool, it was held that the corporation, which had constructed its sewers according to modern plans, and along the lines of natural drainage, was not liable for any injury

resulting to plaintiff's property or business from the polluted condition of the stream. City of Richmond *v.* Test, 18 Ind. App. 482, 48 N. E. Rep. 610.

And in Valparaiso *v.* Hagen, 153 Ind. 337, 54 N. E. Rep. 1062, 48 L. R. A. 707, the city drained its sewage into a natural stream by which it was cast upon the pasture land of a lower proprietor, destroying his grass and depriving him of the use of his land. It was held not to be a *taking* of private property within the constitutional inhibition, but a mere consequential injury for which the corporation was not liable, and that the municipality, acting in conformity to the statutes, skillfully and without negligence or malice, pursuing the only natural and reasonably possible line of drainage, would not be enjoined from discharging its sewage into the stream.

However, in City of Valparaiso *v.* Moffit, 12 Ind. App. 250, 39 N. E. Rep. 909, where the pollution of the stream interfered with the comfortable enjoyment of plaintiff's dwelling-house and injured the rental value of his rent property, the filth from the stream being cast upon his premises in time of high water, it was held to be a public nuisance from which the plaintiff sustained special injury, and that he was entitled to successive recoveries so long as it was continued. And see also, Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435, where it is said that a nuisance created by the discharge of sewage into a mill race owned by private parties is an actionable wrong.

Pollution of Waters—Prescriptive Rights.—In the absence of statute there can be no prescription for a public nuisance of any kind or description. Wood, Nuisance, § 727; Meiners *v.* Brewing Co. (Wis.), 10 L. R. A. 586; Inhabitants of Charlotte *v.* Iron Works (Me.), 8 L. R. A. 828; Peck *v.* City of Michigan City, 149 Ind. 670, 49 N. E. Rep. 800. Whether the right to maintain a private nuisance by discharging sewage into ponds or watercourses can be acquired by prescription is a question upon which there is much conflict of authority. In Smith *v.* City of Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907, it is said that the right to maintain such a nuisance is a well established principle of law; but the weight of authority is believed to be to the contrary. Woodyear *v.* Schaefer, 57 Md. 1, 40 Am. Rep. 419; Sanderson *v.* Pennsylvania Coal Company, 86 Pa. 401, 27 Am. Rep. 711; Pennsylvania Coal Co. *v.* Sanderson, 94 Pa. 302, 39 Am. Rep. 785; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; Kelley *v.* City of New York, 27 N. Y. S. 164, 6 Misc. Rep. 516. And even in those jurisdictions where the right is recognized, it is not looked upon with any degree of favor, and a plea setting up such a right will be construed strictly against the party claiming it. Thus it is held that a prescriptive right will not arise from the fact that the city has drained its sewers into the stream for the required period of time "without objection or hindrance," as such a right can be acquired by nothing less than actual adverse user under a claim of right for the required period of time. Smith *v.* Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907.

And where the waters of a stream had been polluted by the drainage from slaughter pens and similar establishments before the city began to drain its sewage into the same, it was held that the city could not set up a prescriptive right and reckon the time whence it began to run from the date when the stream was first polluted by the slaughter pen and other establishments. Smith *v.* Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907.

And a defense which sets forth that defendant had acquired a prescriptive right to use a stream in a manner different, yet substantially the same as that complained of by plaintiff, was held insufficient, and a demurrer thereto was properly sustained. Nolan *v.* City of New Britain, 69 Conn. 668, 38 Atl. Rep. 703.

And so a city which had for forty years emptied its sewers into a mill pond, but which drainage had created a nuisance only within the last fifteen years, was held not to have acquired a prescriptive right to continue to use the pond as a place of discharge. Middlesex Co.

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v. City of Lowell, 149 Mass. 509, 21 N. E. Rep. 872, 25 Am. & Eng. Corp. Cas. 187.

Nor will the occasional passage of water along a natural channel in small quantities and slightly contaminated ripen into a prescriptive right to discharge sewage of all kinds and unlimited quantity into the stream. Brown *v.* Dunstable (Eng.), 68 L. J. Ch. N. S. 498, 2 Ch. 378.

In Pennsylvania the corporation may connect its sewers with any natural stream, but when it has done so, the obligation to keep the stream cleansed and otherwise in proper condition is said to be a plain municipal duty, the right to neglect which cannot be acquired by prescription. Blizzard *v.* Borough of Danville, 175 Pa. 479, 34 Atl. Rep. 846; Owens *v.* City of Lancaster, 182 Pa. 257, 37 Atl. Rep. 858.

Extraordinary Storms.—In constructing sewers a municipality is under no obligation to provide for extraordinary storms, such as persons of ordinary prudence would not think of guarding against. Allen *v.* City of Chippewa Falls, 52 Wis. 430, 38 Am. Rep. 748; Wright *v.* Wilmington, 92 N. Car. 156; Mayor of Baltimore *v.* Schnitker (Md.), 34 Atl. Rep. 1132; Dist. of Columbia *v.* Gray, 1 App. D. C. 500; Madison *v.* Ross, 3 Ind. 236, 54 Am. Dec. 481. Nor will the city be liable where the storm, during which the overflow occurred, although of unusual severity, might have been anticipated from past experience. City of Denver *v.* Capelli, 4 Colo. 25, 34 Am. Rep. 62. And although the sewer be constructed in the bed of a stream, the city will not be liable for an overflow occurring during an extraordinary rainfall, provided the sewer is sufficient under ordinary conditions. Fairlawn Coal Co. *v.* City of Scranton (Pa.), 23 Atl. Rep. 1069. In German Theological School *v.* City of Dubuque (Iowa), 2 Am. & Eng. Corp. Cas. 625, it is said that the city, in adopting the plan for a system of sewers is bound to take into consideration and provide, not only for the ordinary and usual flow of water, but for such occasional freshets as may reasonably be expected. This, however, is understood to mean that the city is held to the exercise of only ordinary care and prudence, and is not liable for a failure to provide for an unusual or extraordinary storm by which the entire surrounding country is submerged.

But where it appears that although the overflow occurred during a storm of unusual severity, the sewer would nevertheless have been sufficient but for the fact that the city had negligently permitted it to become obstructed or out of repair, recovery may be had for the ensuing damages. Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. Rep. 1091; Cook *v.* San Francisco, 23 Pac. Rep. 1094. Or if the city's negligence merely contributes to the injury of plaintiff's property. Wood *v.* Kansas City, 58 Mo. App. 272. But see Hession *v.* Mayor of Wilmington (Del.), 27 Atl. Rep. 830, 40 Atl. Rep. 749, where it is said that the obstructed condition of the sewer, due to the city's negligence, will not render the city liable if the severity of the storm was such that the sewer, even if unobstructed, would not have been sufficient to carry off the water. See also, Harrigan *v.* City of Wilmington (Del.), 12 Atl. Rep. 779.

Constitutional Law—Taking or Damaging Private Property.—Where the foundation of plaintiff's building was damaged in consequence of an excavation for a sewer being made near it, a recovery was had under a constitutional provision forbidding the taking or damaging of private property except upon due compensation. Reardon *v.* San Francisco (Cal.), 7 Am. & Eng. Corp. Cas. 454. It is also said to be the law in California that the owner of land through which a natural creek flows has a property right, an incorporeal hereditament in the waters of the stream, of which he may not be deprived by the discharge of sewage therein except upon due compensation. Peterson *v.* Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557.

And in Connecticut the pollution of the waters of a river to such an extent that plaintiff's waterpower is destroyed, the operation of his factory made impossible, and the premises about it uninhabitable,

is an invasion of his right of property, which if done for a private purpose is an unjustifiable wrong; and which can be done for a public purpose only upon payment of compensation for the property so taken. Platt *v.* City of Waterbury, 72 Conn. 531, 48 L. R. A. 691, 4 Mun. Corp. Cas. 442, 77 Am. St. Rep. 335.

In Georgia, under a constitutional provision against taking or damaging, recovery may be had where the city has graded its streets and constructed its sewers so as to cause an increased flow of surface water upon adjoining premises. Atkinson *v.* City of Atlanta, 81 Ga. 625, 7 S. E. Rep. 692.

In Louisville *v.* O'Malley (Ky.), 53 S. W. Rep. 287, it is said that a city may no more empty foul matter upon private property from its sewers, than it may have it transported and dumped thereon with teams.

And in Michigan it is said: "Where the plan adopted by the municipality must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable; but where the fault found is with the wisdom of the measure, or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, then the municipality is not liable." Defer *v.* City of Detroit (Mich.), 34 N. W. Rep. 680; Detroit *v.* Beckman, 34 Mich. 125.

In Minnesota it was held that making one's premises a place of deposit for surplus waters in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, was an appropriation requiring compensation to be made. Tate *v.* City of St. Paul (Minn.), 58 N. W. Rep. 158.

In Missouri, in an action against a city for damages occasioned by the bursting of a sewer which it had constructed in a negligent manner, and which it had negligently permitted to become and remain obstructed, the flooding of plaintiff's premises was held to be a taking of private property within the constitutional inhibition, and the city must make just compensation irrespective of any question of its negligence. Thurston *v.* City of St. Joseph, 51 Mo. 510, 11 Am. Rep. 463.

The collecting of water into a basin and conveying it from there through a culvert constructed for the express purpose of discharging it upon plaintiff's land, and upon which it is discharged, cutting a channel for itself through plaintiff's land and depriving him permanently of the use of a portion thereof, is a taking of private property which will be enjoined until just compensation be made. Miller *v.* Mayor of Morristown (N. J.), 20 Atl. 61.

The title of riparian owners in that portion of a river in which the tide ebbs and flows extends only to high water. The state is the absolute owner of the bed of the stream, and the owners of the adjoining shores are not entitled to an injunction to restrain its pollution. But that portion of the river above tide water is private property, and, subject to the right of the general public to use it for purposes of navigation, the riparian proprietors own *ad medium filum aquae*; and where the owners higher up the stream construct a system of sewerage and discharge filth and noxious matter into the stream to the injury of the lower proprietors, such use constitutes a taking of private property within the constitutional inhibition. Grey *ex rel.* Simmons *v.* City of Paterson (N. J.), 48 L. R. A. 717, 42 Atl. Rep. 749.

The destruction of oysters in a private bed by the casting of sewage upon them is as clearly a taking of private property as the physical removal and conversion of the same would have been. Huffmire *v.* City of Brooklyn, 162 N. Y. 584, 48 L. R. A. 421.

Art. 16, § 8, of the constitution of Pennsylvania, declaring that municipal corporations shall make compensation for property taken or destroyed by the construction or enlargement of their works or improvements, does not give a right of action for injury caused by

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the construction of a sewer inadequate to carry off the water which it was intended to drain. Bear *v.* City of Allentown, 148 Pa. St. 80, 23 Atl. Rep. 1062.

The flooding of property, due in part to a change of grade in the city streets and in part to the inadequate size of the sewer, is an actionable wrong under the provision of the Texas constitution forbidding the taking or damaging of private property. Cooper *v.* City of Dallas, 83 Tex. 239, 29 Am. St. Rep. 645.

Statutes.—The Act of 1872, 7 Sp. Laws of Conn. p. 236, authorizing the common council of New Britain to take, occupy and appropriate any stream or part of a stream, natural or artificial, running in or through said city, whenever in their opinion the public health or sewerage shall require such action, does not authorize the pollution of the waters of a stream after they have passed beyond city limits; nor does it confer any authority to appropriate or injure any property beyond city limits. Nolan *v.* City of New Britain, 69 Conn. 668, 38 Atl. Rep. 703. Nor had the City of New Britain the right, under that statute, to appropriate any stream for a sewer until it had first paid all damages that it might thereby occasion to any individual. Kellogg *v.* New Britain, 62 Conn. 232, 24 Atl. Rep. 996.

The discharge of a proposed system of sewers into a natural stream is not in violation of the Rev. Stats. of Ill., ch. 38, § 221, relating to the fouling of watercourses, where it appears that the rapidity of the flow and the dilution of the sewage would be such that the contamination would be slight if any. Walker *v.* Aurora, 140 Ill. 402, 29 N. E. Rep. 741.

A public statute which prohibits the discharge of sewage into any stream within three miles of any point where a water supply is obtained, is not unconstitutional in that it prohibits the use of sewers already in the course of construction, the city having no vested right to the use of the stream. Topeka Water Supply Co. *v.* City of Potwin Place, 43 Kan. 404, 23 Pac. Rep. 578.

In Penney *v.* Commonwealth, 173 Mass. 507, 73 Am. St. Rep. 312, plaintiff, who was a market gardener, was permitted under Stats. 1890, ch. 270, § 1, providing for the payment of all damages sustained by any person whose lands were taken for sewer purposes, to recover for the loss of his crops caused by the temporary drainage of the water from his premises during the construction of a sewer.

In Trowbridge *v.* Town of Brookline, 144 Mass. 139, 10 N. E. Rep. 796, it was held, that, under a statute imposing liability for all "damages occasioned by laying, making, or maintaining a sewer," recovery could be had for the draining of a well on plaintiff's premises, although no part of the sewer was on said premises, and the underground water by which the well was fed, flowed in no definite channel. See also, Bickford *v.* Hyde Park, 173 Mass. 552, 73 Am. St. Rep. 320.

In New York the statute which permits actions for damages by reason of death caused by the wrongful act, neglect, or default of another has no application to an action against a city by the representatives of one who died from disease superinduced by the neglect of sanitary precautions on the part of the public authorities in the construction or maintenance of a sewer system. Hughes *v.* City of Auburn, 161 N. Y. 96, 46 L. R. A. 636.

Public Laws of Rhode Island, 1873, ch. 313, § 5, requiring a property owner, in consideration of his being allowed to make connections with a storm sewer, to sign an agreement releasing the city from liability for all damage which may be occasioned to his estate by the construction, use, or existence of such drain or connection, does not relieve the city from liability for injuries from an overflow caused by a subsequent change in the established grade of certain streets, so as to turn additional water into the sewer, overtaxing its capacity. King *v.* Granger, City Treasurer, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. Rep. 1012.

Under § 1236 of the Rev. Stats. of 1878 of Wisconsin, compensation

may be had by the owner of land which has been injured by the construction of a ditch, although the injury was the result of an error of judgment on the part of the town officers in planning and locating the ditch. Smith *v.* Gould, 61 Wis. 31, 5 Am. & Eng. Corp. Cas. 472.

III. CONSTRUCTION AND MAINTENANCE.

Whatever may be the conflict of opinion as to the duty of a municipal corporation to provide sewers in the first instance, or its liability for injuries arising from defects in the plan of such as it has provided, there is no question in the law upon which there is greater unanimity of opinion than that the duty to exercise reasonable care and skill in the construction and maintenance of sewers is ministerial, and for injuries arising from negligence in this respect, the corporation is liable; and this liability rests solely on negligence, for unless made so by statute (see Blood *v.* Bangor, 66 Me. 154) the corporation is not an insurer against injury from its sewers.

Federal Courts.—Arn *v.* City of Kansas, 14 Fed. Rep. 236; Carmichael *v.* Texarkana, 94 Fed. 561.

"The exercise of judgment and discretion in the selection and adoption of a general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured." Gray, J., in Johnston *v.* Dist. Columbia, 118 U. S. 19, 6 Sup. Ct. Rep. 923, 30 L. Ed. 75.

Alabama.—City Council of Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

California.—Spangler *v.* San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. Rep. 1091.

But where the street is rendered unsafe by a sewer negligently constructed or out of repair, or because of sewer excavations left unguarded at night, a doctrine similar to the New England common-law doctrine in regard to municipal liability for defective streets seems to prevail in California, and the municipality is held not to be liable for personal injuries received because of such defects. Winbigler *v.* Los Angeles, 45 Cal. 36; Tranter *v.* Sacramento, 61 Cal. 275; Barnett *v.* Contra Costa County, 67 Cal. 77; Crowell *v.* Sonoma County, 25 Cal. 315; Huffman *v.* San Joaquin County, 21 Cal. 430; Chope *v.* Eureka, 78 Cal. 588, 21 Pac. Rep. 364.

Colorado.—Denver *v.* Rhodes, 9 Colo. 554, 20 Am. & Eng. Corp. Cas. 411; Denver *v.* Capeli, 4 Colo. 25.

Connecticut.—Judd *v.* Hartford, 72 Conn. 350.

Delaware.—Harrigan *v.* Wilmington, 12 Atl. Rep. 779; Hession *v.* Mayor of Wilmington, 27 Atl. Rep. 830, 40 Atl. Rep. 749; Anderson *v.* Mayor of Wilmington, 19 Atl. Rep. 509.

Georgia.—Mayor of Brunswick *v.* Tucker, 103 Ga. 233, 29 S. E. Rep. 701; Mayor of Macon *v.* Small, 108 Ga. 309, 34 S. E. Rep. 152; Atlanta *v.* Warnock, 91 Ga. 210, 23 L. R. A. 301, 18 S. E. Rep. 135; Mayor of Savannah *v.* Spears, 66 Ga. 304; Mayor of Savannah *v.* Cleary, 67 Ga. 153.

Illinois.—City of Dixon *v.* Baker, 65 Ill. 518, 16 Am. Rep. 591; Effingham *v.* Surrells, 77 Ill. App. 460; Aurora *v.* Love, 93 Ill. 521; Alton *v.* Hope, 68 Ill. 167; Peoria *v.* Eisler, 62 Ill. App. 26.

Indiana.—Valparaiso *v.* Cartwright, 8 Ind. App. 429, 35 N. E. Rep. 1051; Fort Wayne *v.* Coombs, 107 Ind. 75, 57 Am. Rep. 82; Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. Rep. 800; Weis *v.* Madison, 75 Ind. 241; Evansville *v.* Decker, 84 Ind. 325; Logansport *v.* Wright, 25 Ind. 512; Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. Rep. 549; Southbend *v.* Paxon, 67 Ind. 228; Vincennes *v.* Richards, 23 Ind. 381; Roll *v.* Indianapolis, 52 Ind. 547; Rozell *v.* Anderson, 91 Ind. 591.

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Iowa.—Wallace *v.* City of Muscatine, 4 Greene 373, 61 Am. Dec. 131; Powers *v.* Council Bluffs, 50 Iowa 197; Knostman, etc., Co. *v.* Davenport, 99 Iowa 589, 68 N. W. Rep. 887; German Theological School *v.* Dubuque, 64 Iowa 736, 17 N. W. Rep. 153; Ellis *v.* Iowa City, 29 Iowa 229.

Kansas.—King *v.* Kansas City, 58 Kan. 334, 49 Pac. Rep. 88.

Kentucky.—Maysville *v.* Stanton, 14 S. W. Rep. 675. Where the outlet to a sewer has become stopped up, it is the duty of the city either to remove the obstruction or provide another outlet, and it will be liable for any injury resulting from its failure to do so. A city may no more empty foul matter upon private property from its sewers, than it may have it transported and dumped thereon with teams. Louisville *v.* O'Malley, 53 S. W. Rep. 287.

Massachusetts.—Child *v.* Boston, 4 Allen 41, 81 Am. Dec. 680; Hickey *v.* Waltham, 159 Mass. 460, 34 N. E. Rep. 681; Coan *v.* Marlborough, 164 Mass. 206, 41 N. E. Rep. 238; Norton *v.* New Bedford, 166 Mass. 48, 43 N. E. Rep. 1034; Woodward *v.* Worcester, 121 Mass. 245; Bates *v.* Westborough, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. Rep. 1070; Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. Rep. 320; Collins *v.* Waltham, 151 Mass. 196, 24 N. E. Rep. 327; O'Brien *v.* Worcester, 172 Mass. 348, 52 N. E. Rep. 385; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Morse *v.* Worcester, 139 Mass. 389, 2 N. E. Rep. 694; Allen *v.* Boston, 159 Mass. 324, 38 Am. St. Rep. 423; Emery *v.* Lowell, 104 Mass. 13; Stock *v.* Boston, 149 Mass. 410, 21 N. E. Rep. 871.

Where a city constructs a new sewer in place of an old sewer, and walls up the outlet to the old one without giving notice to persons whose drains are connected therewith, it will be liable for an overflow occasioned by such negligence unless the persons injured knew, or should have known, of the walling up of the old sewer, and contributed to their own injury by neglecting to take such precautions as ordinary prudence would have required. O'Brien *v.* City of Worcester, 172 Mass. 348, 52 N. E. Rep. 385.

And so failure to make provision at the outlet of a stream for the increased flow of water which the city has caused by the construction of drains leading thereto, is negligence for which the city will be liable to any one injured thereby. Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. Rep. 320.

Notwithstanding the fact that plaintiff's residence stood on ground which was lower than the level of the sea at high water, the city devised and put into operation a plan to drain it and the other property in the same locality by means of a system of sewers with self-closing valves to prevent the reflux of the water at high tide, and waste weirs to receive such head water as should come down when the valves were closed. It neglected, however, to extend the outlet of the main sewers out to deep water, as a consequence of which they became obstructed by the filling in of some lots, owned by third persons, and situated between the terminus of the sewers and deep water. The obstruction causing plaintiff's premises to become flooded, the city was held liable in an action for damages on the ground that it had been negligent in constructing and maintaining the lower portion of the sewer system, whereby a nuisance had resulted. Child *v.* City of Boston, 4 Allen (Mass.) 41, 81 Am. Dec. 680. But see, however, Buckley *v.* City of New Bedford, 155 Mass. 64, 29 N. E. Rep. 201, where the plaintiff connected his drain with a sewer, which, owing to its narrow outlet, caused the water to flow back and flood his cellar, and it was held that his only remedy was to disconnect his drain from the sewer. And in another case the public sewer built through the street upon which plaintiff's house was situated was not laid deep enough to drain plaintiff's cellar, and no drain led from the cellar to the sewer. Opposite plaintiff's house stood a cesspool, which was frequently obstructed by dirt, snow, and ice. These obstructions prevented the free passage of water through the cesspool, and on such occasions it flowed over into plaintiff's cellar. Had the

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cesspool been kept clear of obstructions the water would all have passed through it and the sewer. The city knew of the condition of the cesspool but neglected to remove the obstructions. *Held*, that the city was not liable on the ground that the city had not required plaintiff to connect his cellar with the sewer, thereby taking the responsibility of the drainage of his premises into its own hands, but had left him to drain his property and protect it in the best way he could. Barry *v.* City of Lowell, 8 Allen (Mass.) 127, 85 Am. Dec. 690.

Maryland.—Hitchins *v.* Frostburg, 68 Md. 100, 11 Atl. Rep. 826; Frostburg *v.* Hitchins, 70 Md. 56, 16 Atl. Rep. 380; Frostburg *v.* Duffy, 70 Md. 47, 16 Atl. Rep. 642; Kranz *v.* City of Baltimore, 64 Md. 491, 2 Atl. Rep. 908.

Michigan.—Detroit *v.* Corey, 9 Mich. 165.

Under a city charter providing that a certain sum, not exceeding two dollars per year, may be charged all persons for the privilege of connecting their private drains with the city sewers, the construction of sewers becomes a private municipal enterprise, in the prosecution of which the city will be liable to any one injured through its negligence. Ostrander *v.* City of Lansing, 111 Mich. 693, 70 N. W. Rep. 332.

Minnesota.—Netzer *v.* City of Crookston, 61 N. W. Rep. 21; Taylor *v.* City of Austin, 32 Minn. 247, 20 N. W. Rep. 157; Simmer *v.* St. Paul, 23 Minn. 408; Pottner *v.* Minneapolis, 41 Minn. 73, 42 N. W. Rep. 784.

In Buchanan *v.* City of Duluth, 40 Minn. 402, 42 N. W. Rep. 204, it was held to be negligence to construct a sewer, having a cross sectional area of 3x3 feet, with a ten-inch gas main diagonally intersecting it at a distance of nine inches from the bottom.

But where a portion of a creek of considerable depth and width had been covered over and converted into a sewer, it was held that the city was under no obligation to construct grates or bars across the open end of the covered portion to prevent people or animals from being washed therein; hence no action could be maintained for the death of a child who wandered along a street which crossed the creek just above the beginning of the covered portion, and who, while playing in the water, fell in and was drowned by being swept into the sewer, the street itself having been platted but never opened for public travel. Nutting *v.* City of St. Paul, 73 Minn. 371, 76 N. W. Rep. 61.

Mississippi.—A city ordered all the inlets from *privies* along a certain sewer to be closed on account of the stench. In doing this the workmen closed an inlet leading from plaintiff's *house* whereby her premises were overflowed and greatly injured. *Held*, that the city was liable. Semple *v.* Vicksburg, 62 Miss. 63, 52 Am. Rep. 181.

Missouri.—Thurston *v.* City of St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Young *v.* Kansas City, 27 Mo. App. 101; Wood *v.* Kansas City, 58 Mo. App. 272; Donahue *v.* Kansas City, 136 Mo. 657, 38 S. W. Rep. 571.

During a fire in certain oil works in the city of St. Louis, hundreds of gallons of escaping oil were turned into one of the sewers under the orders of the chief of the fire department. The lower end of the sewer was stopped up by the high water in the Mississippi river, making it impossible for the oil to escape. It was midsummer and the heat was intense. The oil remained in the sewer four days, generating inflammable and explosive gases, which at the end of that time did explode, causing the death of plaintiff's husband. It was held that the question of the city's negligence was for the jury. Fuchs *v.* St. Louis, 133 Mo. 168, 34 L. R. A. 118.

Nebraska.—Plattsmouth *v.* Boeck, 49 N. W. Rep. 167.

New Hampshire.—In building a sewer, defendants found a short distance below plaintiff's house, a water pipe one inch in diameter, running across the proposed course of the sewer at right-angle, whereupon the sewer pipe was cut and the water pipe was passed

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through the center thereof. In consequence of a parasol floating down the sewer and catching on this pipe, it became obstructed and choked up at that point, so that on several occasions plaintiff's premises were overflowed. *Held*, that the city was liable for the injuries thus resulting from its negligent construction and maintenance of the sewer. Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464.

New Jersey.—Kiernan *v.* Jersey City, 13 Atl. Rep. 170.

New York.—Smith *v.* Mayor, 66 N. Y. 295, 23 Am. Rep. 53; Mayor of New York *v.* Furze, 3 Hill 612; Daggett *v.* City Cohoes, 7 N. Y. S. 882; Wessman *v.* Brooklyn, 16 N. Y. S. 97; Munk *v.* City of Watertown, 22 N. Y. S. 227, 67 Hun 261; Evers *v.* Long Island City, 28 N. Y. S. 825, 78 Hun 242; Bolton *v.* New Rochelle, 32 N. Y. S. 442, 84 Hun 281; Burnett *v.* New York, 36 App. Div. 458, 55 N. Y. Supp. 893; Hardy *v.* City of Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182; Stoddard *v.* Saratoga Springs, 27 N. E. Rep. 1030; Butler *v.* Village of Edgewater, 6 N. Y. S. 174; Demny *v.* City of Kingston, 14 N. Y. S. 601; Lacour *v.* Mayor of New York, 3 Duer 406; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Barton *v.* Syracuse, 36 N. Y. 54; Lloyd *v.* Mayor of New York, 5 N. Y. 369; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. Rep. 344; Nims *v.* Troy, 59 N. Y. 500; Uppington *v.* New York, 58 N. Y. Supp. 533, 41 App. Div. 370.

A municipal corporation is liable for negligence in failing to keep its sewers in repair, but the obligation does not extend beyond the duty to exercise due diligence. There is no absolute undertaking on the part of the corporation that its sewers shall at all times and under all circumstances, be in proper condition. McCarthy *v.* Syracuse, 46 N. Y. 194.

Where the defendant municipality planned a sewer to extend beyond the plaintiff's premises so as to safely and properly discharge its contents into the ocean or river, but failed to follow out the plan in constructing it, and stopped it short of such termination, piecing it out with a wooden trough, or chute, which gave rise to a nuisance, it was held to be negligence, and that the plaintiff might recover for the injuries he had sustained. Hardy *v.* City of Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182.

North Carolina.—Downs *v.* City of High Point, 115 N. Car. 182, 20 S. E. Rep. 385.

Oregon.—Chan Sing *v.* City of Portland, 60 Pac. Rep. 718.

Pennsylvania.—Markle *v.* Borough of Berwick, 21 Atl. Rep. 794; Collins *v.* Philadelphia, 93 Pa. St. 272; Blizzard *v.* Borough of Danville, 175 Pa. 479, 34 Atl. Rep. 846; Owens *v.* Lancaster, 182 Pa. 257, 37 Atl. Rep. 858; Briegel *v.* Philadelphia, 135 Pa. St. 451, 20 Am. St. Rep. 885, 19 Atl. Rep. 1038; Vanderslice *v.* Philadelphia, 103 Pa. St. 102.

Where water was negligently diverted from a natural watercourse and turned upon private premises, it was held to be no defence that it flowed first over intervening premises; nor that the mischief would be remedied upon the completion of the general plan of sewerage. Gift *v.* Reading, 3 Super. Ct. (Pa.), 359.

Rhode Island.—King *v.* Granger, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. Rep. 1012; Clark *v.* Peckham, 9 R. I. 455.

South Dakota.—In the construction of its drains and sewers a city is bound to take notice of the existence of areas in the street and sidewalk, and it will be liable to the owner of such area when the same is flooded through its negligence in constructing or maintaining its drains and sewers, unless the walls and openings of the area were so badly constructed or in want of repair as to contribute to the damage sustained. Dell Rapids Mercantile Co. *v.* City of Dell Rapids, 11 S. Dak. 116, 75 N. W. Rep. 898.

Tennessee.—Mayor of Nashville *v.* Sutherland, 94 Tenn. 356, 19 L. R. A. 619, 29 S. W. Rep. 228; Horton *v.* Nashville, 4 Lea 39, 40 Am. Rep. 1.

Texas —City of Dallas *v.* Schultz, 27 S. W. Rep. 292; Parker *v.* City of Laredo, 28 S. W. Rep. 1048; City of Dallas *v.* Cooper, 34 S.

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W. Rep. 321; Lindsay *v.* City of Sherman, 36 S. W. 1019; Gross *v.* Lampasas, 74 Tex. 195, 11 S. W. Rep. 1086.

Whether it is negligence for a city to construct a grating over a catch basin with the meshes sufficiently wide to permit the passage of a woman's foot, which grating is out of the way of all travel, save pedestrians crossing the street at a place other than the regular crossing, is a question for the jury. City of Dallas *v.* Webb, 22 Tex. Civ. App. 48, 54 S. W. Rep. 398.

Utah. -Levy *v.* Salt Lake City, 16 Pac. Rep. 598; Kiesel & Co. *v.* Ogden City, 30 Pac. Rep. 758.

Vermont.—A village charter authorizing the construction of sewers is not mandatory, but merely confers the privilege; hence where the village undertakes to construct a sewer and performs the work in a negligent manner, it is liable for the resulting injuries. Winn *v.* Rutland, 52 Vt. 481; Haynes *v.* Burlington, 38 Vt. 350.

Virginia.—Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. Rep. 339.

Wisconsin.—Gilluly *v.* City of Madison, 63 Wis. 518, 53 Am. Rep. 299; Schroeder *v.* City of Baraboo, 67 N. W. Rep. 27; Harper *v.* Milwaukee, 30 Wis. 365.

IV. SEWERS CONSTRUCTED ON PRIVATE PROPERTY—LIABILITY FOR SEWERS CONSTRUCTED BY THIRD PERSONS.

If the city has adopted and is using the sewer in question, it is not material when or by whom it was constructed. It must use reasonable diligence to keep it in proper repair, or it will be liable in damages to one whose premises were overflowed by reason of its obstructed condition. Taylor *v.* City of Austin, 32 Minn. 247, 20 N. W. Rep. 157; Levy *v.* Salt Lake City (Utah), 16 Pac. Rep. 598.

So if the city government or the officials of the city charged with the care of the sewers had notice of the changes and consequent obstructions or liability to obstructions, and neglected to keep them properly open and in suitable condition, and loss and damages come to individuals by reason of such neglect, the city must respond although the changes were made and the obstructions caused by wrongdoers, and without authority. *A fortiori* where such changes are made and the obstructions caused by persons acting under authority from the city. Nims *v.* Mayor, etc., of Troy, 59 N. Y. 500.

And so where a contractor, in laying a sewer across one of the streets of the defendant city, excavated a trench ten or fifteen feet in depth, throwing the earth so that it formed an embankment two or three feet high completely across the street, causing the water to back over the curbing during an unusually severe storm and flood plaintiff's cellar, the city was held liable on the ground, that having supervisory control over the work, it was negligent in failing to see that the contractor carried it out in a careful and proper manner. City of Denver *v.* Rhodes, 9 Colo. 554, 20 Am. & Eng. Corp. Cas. 411.

So where a municipality adopted a running stream as a sewer, arching it over and extending the covering thereof as the city grew and new streets were opened up, until it had been in use as a sewer for more than twenty years, it was held that the city was liable for any damage arising from its defective condition just as if it had been originally constructed as an artificial sewer. Kranz *v.* City of Baltimore, 64 Md. 491, 2 Atl. Rep. 908.

So where a city street crosses a canal owned by a private corporation, the city has a right, without the consent of the company, to construct a sewer along the street and under the bed of the canal, and the fact that the city yielded to the groundless claim of the canal company, that the sewer could be constructed only with its consent and according to plans and specifications furnished by its engineer, will not relieve the city from liability to a third person for a nuisance arising from its negligent construction and maintenance of that portion of the sewer. City of Fort Wayne *v.* Coombs, 107 Ind. 75, 57 Am. Rep. 82.

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A corporation which flows its sewage through drains constructed by private persons is a joint tort feasor with the persons owning the drains, and as such is liable for a nuisance arising from the flowage of polluted water through the same. Kewanee *v.* Ladd, 68 Ill. App. 154.

And although the lease under which the drain on private property was maintained had expired at the time of the flooding of the land, yet if it was the necessary outlet of a system of sewers still maintained by the city, and it was through the city's negligence that it became obstructed, the city will be liable. Bates *v.* Inhabitants of Westborough, 151 Mass. 174, 23 N. E. Rep. 1070.

But the acquisition of property upon which a private drain is located by the trustees of a bridge held for the benefit of the city, is not an adoption of the drain by the city, nor does it impose any obligation upon the city to keep the same open. Kosmak *v.* City of New York, 6 N. Y. S. 453, 53 Hun 329.

Nor is a municipal corporation liable for the overflow of a private drain where plaintiff, under authority from the city, has connected his premises therewith. Kosmak *v.* City of New York, 6 N. Y. S. 453, 53 Hun 329.

So where the city ordinance compels the laying of private sewers by their owners and at the expense of the owners, the city is not liable where it lowers a main sewer and reconnects plaintiff's private sewer therewith in such a negligent manner that the water is set back and overflows plaintiff's cellar. Streiff *v.* City of Milwaukee, 89 Wis. 218, 61 N. W. Rep. 770.

So a city is not liable for damages sustained by a person caused by an inadequate culvert erected in a street by a railroad company, to which the city had granted the right of way upon the street, for its own use and as a part of its road bed. The existence of the street had no relation to the injury, as in its absence the culvert in the same place would have produced the same injury. Stackhouse *v.* City of Lafayette, 26 Ind. 17, 89 Am. Dec. 450.

And where one constructed a sewer on his premises and through it discharged filth and garbage into the street, creating a nuisance to the injury of the adjacent premises, the owner of such adjacent premises cannot maintain an action against the city for failing to provide sewers, or for failure to abate the nuisance, but his remedy is against the proprietor of the offending sewer for maintaining a private nuisance. City of Chattanooga *v.* Reid, 103 Tenn. 616, 53 S. W. Rep. 937.

A municipal corporation is not liable for the improper execution of a public work by agents whom it was *obliged* to employ for the purpose, and where the performance or nonperformance of the work was not left to the discretion of the city. But where the city undertakes the work in the exercise of its own discretion, it must use due care and reasonable skill in its execution, or it will be held liable for any negligence on the part of those whom it has employed to do the work. Mayor, etc., of New York *v.* Furze, 3 N. Y. 612.

So no recovery can be had by one whose damage accrued through his connecting his drain with a sewer which was already obstructed and out of repair and which was constructed under an order of court upon petition therefor, the city having no control and making no use of the same. Town of Monticello *v.* Fox, 3 Ind. App. 481, 28 N. E. Rep. 1025.

So under a statute which provides that "*after* a public drain is constructed and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town," etc., a town is not liable where the alleged nuisance is the result of negligence in allowing the street to be dug up for an unreasonable length of time and in filling the excavation with farm dressing. Bulger *v.* Inhabitants of Eden, 82 Me. 352, 33 Am. & Eng. Corp. Cas. 108.

But where the state legislature deems the extension of the sewer system of a certain municipality both necessary and expedient, and

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appoints commissioners under whose direction the extended system is discharged into a creek, thereby giving rise to a nuisance, the corporation, *having adopted* the extension, is liable in damages regardless of any question of negligence on the part of the commissioners. Moody *v.* Saratoga Springs, 17 App. Div. 207, 45 N. Y. Supp. 365.

V. PLEADING.

Remedy—Cutting Off Water Supply.—If the city in constructing a sewer negligently uncover a waterpipe and leave it exposed, so that the water therein freezes, cutting off the water supply to the injury of one to whom the city is under contract to supply water, he need not rely on his action on the contract but may maintain an action of tort for the injuries sustained. Stock *v.* Boston, 149 Mass. 410, 21 N. E. Rep. 871, 14 Am. St. Rep. 430.

Same—Filling of Sewer by Adjoining Owner—Nuisance.—An adjoining owner cannot treat as a nuisance and fill up a sewer constructed by municipal authority; his remedy is by action. McGregor City *v.* Boyle, 34 Iowa 268.

Same—Statute.—Under the Laws of 1889, ch. 201, and Laws of 1892, ch. 220, giving the entire charge and control of sewers to the drainage commissioners, and providing that such commissioners may sue and be sued, the corporation is not relieved from liability for a nuisance resulting from the manner in which a sewer is maintained. Bolton *v.* Village of New Rochelle, 32 N. Y. S. 442, 84 Hun 281.

Same—Statute—City Going beyond Authority Conferred.—When municipal authorities are authorized to lay out and construct sewers and drains under a statute which provides a method of assessing the damages of those to whom injury results as the necessary consequence of carrying out the work as contemplated by the statute, recovery can be had only in the method prescribed by the statute, and an action at law or bill in equity will not lie. But where the municipal authorities, assuming to act under such statute, go beyond the authority conferred, or omit to take the proper precautions to guard against the consequences of its operation, or perform the work in such a negligent and unskillful manner that a nuisance is created, the city may be liable to indictment on behalf of the public, or may be sued by any person sustaining special injury. Haskell *v.* City of New Bedford, 108 Mass. 208; Merrifield *v.* City of Worcester, 110 Mass. 216; Broyton *v.* City of Fall River, 113 Mass. 218; Boston Belting Co. *v.* Boston, 149 Mass. 44.

Same—Same—Same.—The statute of 1881, ch. 303, § 3, authorizing the city of Boston to condemn lands on or near the line of a sewer for the purpose of erecting a plant for the disinfection of sewage and freeing it from noxious matter, does not authorize the creation of a nuisance to lands not taken; and where the owner is deprived of the use of his lands by such nuisance, it is not such a taking as may be compensated for under the statute, but he may maintain an action as at common law. Bacon *v.* City of Boston, 154 Mass. 100, 28 N. E. Rep. 9.

Same—Same.—Under Stats. Mass. 1874, ch. 196, the city of Boston undertook to improve Stony Brook, and did the work in such a way that the flow of water therein was very much decreased at times, so that plaintiffs, who owned a factory on the brook were injured in their business. At other times, owing to the city's negligent failure to improve the outlet of the brook, the water overflowed plaintiff's premises. *Held*, that for injuries resulting from the first cause they must seek redress under the statute; but for the injuries resulting from the second cause, they were at liberty to maintain an action for negligence. Boston Belting Co. *v.* City of Boston, 149 Mass. 44, 20 N. E. Rep. 320.

Same—Continuing Nuisance—Statute of Limitations.—Where the injury complained of is of a character so permanent that the entire damage accrues in the first instance, the statute of limitations begins

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to run from the time of the entire loss; but where the injury is a continuing one from day to day, recovery may be had for the subsequent injuries although the original cause of action be barred. The continued fouling of plaintiff's docks by the discharge of sewage near by is an injury of this latter class. Peck *v.* City of Michigan City, 149 Ind. 670, 49 N. E. Rep. 800.

Same—Information—Indictment—Public Nuisance.—When the negligent construction or maintenance of a sewer results in a public nuisance, the remedy lies in an information or indictment on the part of the state; and when it results in a private nuisance an action for damages may be maintained by the individual injured. Kiernan *v.* Jersey City (N. J.), 13 Atl. Rep. 170.

Same—Village Connecting Its Sewers with Those of Adjoining City.—A village constructed a system of sewers, connecting the outlet thereof with the sewer system of the adjoining city, illegally and without the latter's consent, though not without its knowledge. The city sewers proved inadequate to carry off this increased volume of sewage, and overflowed, injuring the property of one of the villagers. In an action against the city for the ensuing damage, it was held that the city was liable, but was entitled to a recovery over against the village. Grothe *v.* City of Montreal, M. L. Rep. 7 Sup. Ct. 267.

Same—Liability of City for Damage Resulting from Sewer Constructed by Town Subsequently Merged into City.—The town of Flatbush constructed a sewer which discharged within three hundred feet of plaintiff's oyster beds, destroying them. Subsequently the town was merged into the city of Brooklyn. *Held*, that the city of Brooklyn was the proper party defendant in an action by plaintiff for the loss of his oysters. Huffmire *v.* Brooklyn, 162 N. Y. 584, 48 L. R. A. 421.

Same—Discharging Water on Lots.—In grading its streets and constructing its sewers so that surface water is discharged upon plaintiff's lots in increased volume, the city is not guilty of creating a nuisance, and the plaintiff can recover only by bringing his action within the statutory time and under the constitutional provision prohibiting the taking or damaging of private property except upon due compensation. Atkinson *v.* City of Atlanta, 81 Ga. 625, 7 S. E. Rep. 692.

Same—Presentation of Demand Not Necessary.—Where plaintiff's property is injured by the overflow of a defective sewer, the presentation of a claim for damages before instituting suit is not a condition precedent to the right to recover. Spangler *v.* City and County of San Francisco, 84 Cal. 12, 23 Pac. Rep. 1091; Cook *v.* City and County of San Francisco, 23 Pac. Rep. 1094.

Remedy—Injunction.—The use of a sewer which creates a private nuisance will be restrained by a court of equity at the suit of a private individual. Chapman *v.* City of Rochester, 110 N. Y. 273, 6 Am. St. Rep. 366, 1 L. R. A. 296; Atlanta *v.* Warnock, 91 Ga. 210, 23 L. R. A. 301, 18 S. E. Rep. 135; Breed *v.* Lynn, 126 Mass. 367; Goldsmid *v.* Tunbridge Wells Improv. Com'rs, L. R. 1 Eq. 161, L. R. 1 Ch. 348; Woodward *v.* Worcester, 121 Mass. 245; Demby *v.* Kingston, 60 Hun (N. Y.) 294; O'Brien *v.* St. Paul, 18 Minn. 176; Bell *v.* Rochester, 33 N. Y. S. 739; Schriver *v.* Johnston, 71 Hun (N. Y.) 232, 24 N. Y. S. 1083; Carmichael *v.* City of Texarkana, 94 Fed. Rep. 561; Bd. of Health of Village of New Brighton *v.* Casen, 3 N. Y. S. 399; Middlesex Company *v.* City of Lowell, 149 Mass. 509, 21 N. E. Rep. 872; Vick *v.* Rochester, 46 Hun (N. Y.) 607; Pettigrew *v.* Evansville, 25 Wis. 223, 3 Am. Rep. 50; Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 27 N. E. Rep. 1030; Beach *v.* Elmira, 22 Hun (N. Y.) 158; Dierks *v.* Addison Twp. Com'rs, 142 Ill. 197, 31 N. E. Rep. 496; Butler *v.* Thomasville, 74 Ga. 570; Danbury & N. R. Co. *v.* Norwalk, 37 Conn. 109; Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703; Haskell *v.* New Bedford, 108 Mass. 208; Boston Rollings Mills *v.* Cambridge, 117 Mass. 386; Atty. Gen. *v.* Birmingham, 4 K. & J. 528; Spokes *v.* Banbury, L. R. 1 Eq. 42; Atty. Gen. *v.* Bradford, L. R. 2 Eq. 71; Atty. Gen. *v.* Colney, L. R. 4 Ch. 146; Bond *v.* Lynn, 126

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Mass. 367. But an injunction will not lie where the apprehended nuisance is contingent and uncertain. It must either exist, or the evidence must show that unless the threatened use or construction is enjoined, a nuisance will undoubtedly result. Town of Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. Rep. 300; Americus *v.* Eldridge, 64 Ga. 524; Robb *v.* La Grange, 158 Ill. 21, 42 N. E. Rep. 77; Newark Aqueduct Board *v.* Passaic, 46 N. J. Eq. 552, 18 Atl. Rep. 106, 20 Atl. Rep. 54; City of Hutchinson *v.* Delano (Kan.), 33 Am. & Eng. Corp. Cas. 87, 26 Pac. Rep. 740; Washburn & M. Mfg. Co. *v.* Worcester, 116 Mass. 458; Morgan *v.* City of Binghamton, 102 N. Y. 300, 7 N. E. Rep. 424, 13 Am. & Eng. Corp. Cas. 481.

Same—Same—Discharging Water upon Private Property.—Discharging surface water directly upon plaintiff's premises through a drain or sewer constructed for that express purpose, forcing it thereby to cut a channel for itself through said premises, and depriving plaintiff of the use of a considerable proportion of his land, is a wrong which may be restrained by injunction. Miller *v.* Mayor of Morristown (N. J.), 20 Atl. Rep. 61.

Same—Same—Same.—Where the sewer and other drains complained of do not cast upon plaintiff's premises any greater volume of water than was wont to flow there before their construction, an injunction will not lie to compel the discontinuance of the same. Rutherford *v.* Village of Holley, 105 N. Y. 632, 11 N. E. Rep. 818.

Same—Same—Grating over Entrance to Sewer.—Where the gratings over the entrance to sewers are sufficient, when unobstructed by sticks, leaves, and trash, to admit all the water flowing into the sewers, and their removal would leave openings dangerous to the safety of the public, an injunction ordering their removal will be denied. Paine *v.* Delhi, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797.

Same—Same—Separate Owners Joining in Complaint.—Separate owners of town lots may join in a suit to restrain a municipality from collecting surface water into one sewer or drain and casting it upon their lots. Town of Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. Rep. 300.

Same—Same—Inestimable Hardship—Substituted Remedy.—An injunction will not be granted to restrain the pollution of a stream where it would work inestimable hardship upon the parties restrained and where a substituted remedy, giving the complainants adequate compensation for their injury, would be a just disposition of the controversy. Grey *ex rel.* Simmons *v.* City of Paterson (N. J.), 48 L. R. A. 717, 42 Atl. Rep. 749.

Same—Same—Nuisance Per Se.—The discharge of the sewage of a village of sixteen hundred inhabitants into a small stream flowing through private property constitutes a nuisance *per se*, and in such case the property owner is entitled to an injunction without having first established his right at law. Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. Rep. 218.

Same—Same—Procedure.—In the absence of a cross appeal, a bill of exceptions affords no foundation for an injunction restraining the further pollution of a stream in addition to the judgment awarding plaintiff damages in the court below. Watson *v.* Town of New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. Rep. 345.

Same—Same—Outlet on Private Property.—Where the city constructed the lower portion and outlet of a sewer so negligently that the sewage was discharged on plaintiff's premises, it was held that he was entitled to both injunctive relief and damages, although such lower portion and outlet were located on private property where the city had no authority to construct a sewer, and had no control over such portion. Stoddard *v.* Village of Saratoga Springs (N. Y.), 27 N. E. Rep. 1030.

Same—Same—Sewage—Carried in Unnatural Direction—Nuisance Per Se.—A sewer which carries the major portion of the sewage of a village in an unnatural direction and deposits it upon a farm, creating such a stench that persons working on the farm are sickened and

caused to vomit, is a nuisance *per se*, and may be abated by injunction. Dierks *v.* Com'rs of Highways of Twp. of Addison, 142 Ill. 197, 31 N. E. Rep. 496.

Same—Same—Does Not Lie against County.—Where plaintiff brought an action for damages and to restrain a nuisance created by the county in discharging the sewage from its almshouse and penitentiary into a stream flowing through his land, and by spreading its night soil and other filth upon the farm appurtenant to said buildings, which farm was just across the highway from plaintiff's premises, it was held that no action would lie against the county, as it was acting in a governmental capacity, but that plaintiff might find a remedy by filing a bill for an injunction against the members of the county board of supervisors and the officials in charge of the county buildings. Lefrois *v.* Monroe County, 162 N. Y. 563, 57 N. E. Rep. 185, 50 L. R. A. 206, reversing 48 N. Y. S. 519, 24 App. Div. 421.

Same—Same—Bona Fides.—Although an injunction will not be granted because defendant has remained inactive, knowing that the city was expending large sums in the prosecution of the work complained of, it does not follow that an injunction will not issue to restrain the construction of certain sewers which have been adjudged to be a nuisance; because the city, having been advised of the illegal character of the work, was not acting in good faith in proceeding with the construction thereof. Vick *v.* City of Rochester, 46 Hun 607.

Same—Same—Parol License.—A city cannot empty its sewers upon private propetry without acquiring the right to do so. And a parol license that the sewage from a particular district may be discharged onto private property does not authorize the discharge of the sewage from a much larger territory upon the property, and the same may be stopped by injunction. New York Cent. & H. R. R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. Rep. 416.

Same—Same—Revocation of License.—Upon a bill filed to enjoin a village from discharging its sewage into a small stream flowing through private property, the plaintiff is not estopped by the fact that he once gave the defendant an oral license to so use the stream, as such permission was no more than a mere license revocable at will. Nor does the fact that the city has expended considerable sums in collecting materials and making preparations to begin the improvement present any obstacle to the right of revocation. Village of Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. Rep. 218.

Same—Same—Plaintiff Not Estopped by Having Discharged His Own Sewage into Stream.—The fact that plaintiff has discharged his own sewage into the city sewers, thereby contributing to the pollution of the stream, does not estop him from maintaining a bill for an injunction to restrain any further pollution of the stream. Platt *v.* Waterbury, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335.

Same—Same—Discharge of Sewage into Private Canal.—An injunction may be had to restrain the draining of sewers into a private canal, thereby ruining navigation, although this had continued for about eighteen years; but up to that time no material injury had been done. Boston Rolling Mills *v.* Cambridge, 117 Mass. 396.

Same—Same—Establishment of Disinfecting Plant Subsequent to Filing of Bill.—Where the nature of the nuisance is such that a permanent injunction is otherwise proper, it will not be refused because the city shows that it has, since the action was begun, about completed a plant which will disinfect and deodorize its sewage and render noninfectious any pollution of plaintiff's stream, but which does not show that it will render the waters thereof potable and fit for use. Peterson *v.* Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557.

Same—Same—Water Rights—Constitutional Law.—The owner of land through which a natural creek flows has a property right, an incorporeal hereditament, in the waters of the stream; and where the discharge of sewage into such stream renders the waters unfit for domestic use, or for stockwater, and causes it to give forth an odor, which, while very offensive, is not positively injurious to health, he

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is entitled to a permanent injunction, not only on account of the nature of the nuisance, but also to avoid a multiplicity of suits. Peterson *v.* Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557.

Same—Same—Injunction Is Too Broad, When.—The purpose of the suit being to restrain the city from discharging more sewage upon the lands of the licensor than he had consented to receive, an injunction forbidding the city to refrain forever from connecting any other sewer with the one discharging upon the licensor's land is too broad, since the city should be permitted to connect other sewers therewith provided it finds another outlet; and the injunction will be modified accordingly. New York Central & H. R. R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. Rep. 416.

Same—Same—Injunction Is Not Too Broad, When.—An injunction which restrains the discharge into a river of any sewage, even if not of a noxious or polluting character, or though entirely and permanently disinfected and purified, is not too broad. Morgan *v.* City of Danbury, 67 Conn. 484, 35 Atl. Rep. 499.

Same—Same—Not Contingent upon Action of Legislature.—The fact that the legislature has taken steps looking toward the adoption of a plan of sewage for the whole valley is no defence to a bill filed to restrain defendant municipality from continuing the nuisance caused by the pollution of the stream. And it is unnecessary to incorporate in the order of injunction a provision that it is made subject to the authority of such future legislation, or that it should become inoperative if the defendant should thereafter acquire the plaintiff's premises by condemnation. Platt *v.* Waterbury, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335.

Same—Same—Constitutionality of Statute Authorizing Nuisance.—Where a city acts carefully and within the authority conferred by statute it will not be enjoined from emptying its sewage into a natural stream, thereby creating a nuisance to the injury of those below. A statute conferring such authority does not infringe a constitutional provision against the taking of private property without just compensation. City of Valparaiso *v.* Hagen, 153 Ind. 337, 54 N. E. Rep. 1062.

Same—Same—Necessary Averments of Bill.—A complaint which fails to aver the absence of skill or the want of due care, or that some other outlet could more reasonably be had, or that some other reasonable method of disposing of the city sewage is available, is insufficient to entitle the complainants to the relief prayed, and a demurrer thereto should be sustained. Valparaiso *v.* Hagen (Ind.), 54 N. E. Rep. 1062, 48 L. R. A. 707.

Same—Same—Court Will Not Undertake to Control Municipal Discretion.—Plaintiff filed a bill for an injunction to restrain the city from constructing a sewer, alleging that the diameter of the proposed sewer was to be only two feet, while it should be at least three in order to carry off the water in the heaviest rains. *Held*, that the municipality had absolute control over its streets and sidewalks, and might construct such drains for the disposal of its surface water as it saw fit; hence the injunction must be denied. Americus *v.* Eldridge, 64 Ga. 524, 37 Am. Rep. 89. And see Scranton City's Appeal, 121 Pa. St. 97, 6 Am. St. Rep. 755.

Same—Same—Same.—Defendant city constructed a sewer under plaintiff's premises, which in the course of time, as lateral branches were added to it, burst from the increased volume of water pouring into it, and from obstructions which the city negligently omitted to remove. Plaintiff filed a bill in equity to recover damages and to compel the defendant city to build a new sewer at a different place in order to relieve the old sewer of some of the demands made upon it. *Held*, that a court of equity had no authority to compel city authorities to construct a sewer, and that as for the damages, the remedy was at law. Horton *v.* Mayor, etc., of Nashville, 4 Lea 39, 40 Am. Rep. 1.

Remedy—Public Nuisance.—The proper method of abating a public

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nuisance is by indictment, or by information or bill in equity on the part of the proper state officer, or by the appropriate action instituted by a municipal corporation. The very act of accumulating and permitting to remain large masses of filth borne down by the sewers in a place where they are prejudicial to public health is *per se* proof conclusive of negligence sufficient to sustain an indictment for creating a nuisance. State *v.* City of Portland, 74 Me. 268, 43 Am. Rep. 586.

Remedy—Right of City to Abate.—A city can maintain an action to abate a nuisance caused by the emptying of a private sewer into a small stream within city limits, though it have no interest in the stream nor in the land affected. City of Belton *v.* Baylor Female College (Tex.), 33 S. W. Rep. 680; City of Belton *v.* Central Hotel Co. (Tex.), 33 S. W. Rep. 297.

Same—Same—Private Sewers.—The city has the right to abate a nuisance caused by a private sewer although the sewer was laid with the permission of the city authorities, and if the business of the hotel owning the sewer cannot be conducted without creating a nuisance in a populous part of the city, it must close until the hotel devises some way in which it can be conducted with due regard to the health and safety of the public. State Bd. of Health *v.* Hutchison, 39 N. J. Eq. 218, 569.

Same—Same—Statute.—Where the city of Jersey City created a nuisance upon certain lowlands within the limit of the city of Hoboken by discharging sewage thereon through a defectively constructed sewer, and which nuisance was aggravated by the stoppage of certain natural watercourses by certain railway companies, it was held that, under § 2 of Act of May 24, 1894, p. 495 (Gen. St. pp. 1646, 1647), the state board of health might maintain a bill against all parties for an injunction to abate the same. State (State Board of Health) *v.* Mayor, etc., of Jersey City *et al.*, 55 N. J. Eq. 116, 35 Atl. Rep. 835.

Same—Same—Enjoining the Erection of Building over Drain Constructed by County Commissioners.—Where a public statute authorized county commissioners to lay out open drains, or sewers, from certain ponds, through the limits of certain towns, to tidewater beyond, said drains being for the benefit of said towns, it was held to impose a municipal duty upon said corporations to keep said drains, after their completion, in proper condition and repair; and if in their judgment it was necessary that they be maintained as open drains, an injunction would lie to prevent any portion of them being covered by the erection of a building by private parties. Town of Melrose *v.* Cutter, 159 Mass. 461, 34 N. E. Rep. 695.

Same—Same—Adjoining Municipalities.—In Gould *v.* City of Rochester, 105 N. Y. 46, 12 N. E. Rep. 275, the city of Rochester, which adjoins the town of Brighton, constructed sewers which discharged into ditches near the boundary line between the two, and which carried the sewage upon and over lands in Brighton, and ultimately into a creek, a small stream flowing through the town and having its outlet into the bay beyond. The ditches were constructed by the city of Rochester under legislative authority to acquire land beyond city limits and open ditches thereon to carry off the city drainage. In an action to abate the nuisance thus created, it was held, that while the town officials could not go within the limits of the city of Rochester and abate the nuisance by stopping the sewers, yet they might invoke the aid of a court of equity to restrain the same by injunction.

Same—Same—Generally.—There is some doubt as to how far the right of a municipality to abate a public nuisance extends. According to some authorities it extends only to those cases where, as a separate and distinct entity, it has sustained special and peculiar damage. Other authorities assert that, acting as the representative of general public interest, a municipality may maintain an action to abate a public nuisance in any instance. The correct distinction is,

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perhaps, that, as to nuisances affecting those matters which have been confided to the municipality in its governmental capacity, it may maintain an action to abate without showing special or peculiar injury; but as to other nuisances, it must show such injury. See Newark Aqueduct Board *v.* City of Passaic, 46 N. J. Eq. 552, 18 Atl. Rep. 106; Dayton *v.* Robert, 8 Ohio C. C. 649; Jersey City *v.* Central R. Co., 40 N. J. Eq. 417, 2 Atl. Rep. 262; Burlington *v.* Schwarzman, 52 Conn. 181, 52 Am. Rep. 571; Springfield *v.* Conn. River Co., 4 Cush. 63; Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012; Detroit Water Com'rs *v.* Detroit, 117 Mich. 458, 76 N. W. 70; Detroit *v.* Detroit, etc., R. Co., 23 Mich. 173; Ottumwa *v.* Chinn, 75 Iowa 405, 39 N. W. Rep. 670; Dove *v.* Portsmouth Bridge Co., 17 N. H. 200; Sheboygan *v.* Sheboygan & F. du L. R. Co., 21 Wis. 668; Janesville *v.* Carpenter, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. Rep. 128; Teass *v.* St. Albans, 38 W. Va. 1, 19 L. R. A. 802, 17 S. E. Rep. 400; Pine City *v.* Munch, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. Rep. 197; Belton *v.* Central Hotel Co. (Tex.), 33 S. W. Rep. 297; Belton *v.* Baylor Female College (Tex.), 33 S. W. Rep. 680; Yonkers Bd. of Health *v.* Copcutt, 140 N. Y. 12, 23 L. R. A. 485, 35 N. E. Rep. 443; New Orleans Bd. of Health *v.* Maginnis Cotton Mills, 46 La. Ann. 806, 15 So. Rep. 164; Lake View *v.* Letz, 44 Ill. 81.

Same—Who May Sue.—In Penney *v.* Commonwealth, 173 Mass. 507, 73 Am. St. Rep. 312, it was held that one who under the statute had a right of action for damage done to his premises during the construction of a sewer thereon, might sell the premises reserving his right to sue.

Same—Mortgagee.—A mortgagee in possession after condition broken may maintain an action for a private nuisance as though he were the owner out and out; and a mortgagee out of possession will be permitted to bring an action wherever the injury is such as tends to impair his security. Kiernan *v.* Jersey City (N. J.), 13 Atl. Rep. 170.

Same—Pollution of Stream Is Not a Public Nuisance When.—The pollution of a stream, whereby the property of all the riparian owners for ten miles below is injured, does not constitute a public nuisance, for it is only those individuals, and not the public in general, who suffer; and in such case each may recover the damage he suffers, though it differ only in degree, and not in kind, from that suffered by the others. Smith *v.* Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907.

Same—Continuing Injury to Real Property.—The rule that the right of action for a trespass to real property is confined to the one who owned the property at the time the trespass was committed, does not apply to injury caused to land by the discharge of sewage into a stream flowing through it, such injury being of a continuing nature and increasing in its injurious effects as the sewer system is extended. Smith *v.* Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907.

Joint Tort Feasors.—In an action against a city for creating a nuisance to plaintiff's premises by the discharge of sewage into a stream flowing past said premises, the city alleged in its answer that the injury was due to the action of the lessees of its sewer farm in turning the sewer water directly into the stream before it had been disinfected and deodorized, and prayed that they be made parties defendant to the suit, and that a judgment in favor of the city be rendered over against them for any amount that might be recovered against the city. *Held*, that an order dismissing said lessees from the suit on demurrer was erroneous; that although the lessees were under no express contract to consume all the water on the sewer farm, and that although the city continued to use the sewers after the nuisance had been created, and was therefore in some sense a joint tort feasor with the defendant lessees, yet they being tenants of the city, and their positive wrongful acts having been the primary and immediate cause of the injury complained of, the city was entitled to indemnity against them. City of San Antonio *v.* Smith, 59 S. W. Rep. 1109, reversing 57 S. W. Rep. 881.

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Same.—Where a municipal corporation and a railway company both contribute to the creation and maintenance of a nuisance, the city by depositing filth through a defective sewer upon low lands within its limits, and the railroad by constructing an embankment which stops all flow of water in a stream which is the natural drain for such lands, they are both liable. State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 35 Atl. Rep. 835.

Same—Who Are Not Joint Tort Feasors.—The case of Chipman *v.* Palmer, 77 N. Y. 51, while not a municipal case, is instructive in showing who are not joint tort feasors where several contribute to the pollution of a stream. In that case the sewage from a number of boarding houses and hotels, among them that of the defendant, was drained into the stream above plaintiff's premises, said plaintiff being himself the proprietor of a boarding house. The plaintiff brought suit against the defendant for creating a nuisance, and attempted to hold him responsible for the acts of all the others using the stream in the same manner that he did. The court of appeals held that he was not a joint tort feasor, but was liable only for the separate injury committed by him, saying: "The defendant's act, being several when it was committed, cannot be made joint because of the consequences which follow in connection with others who had done the same or a similar act. It is true, it is difficult to separate the injury, but that furnishes no reason why one tort feasor should be made liable for the acts of others who have no association and did not act in concert with him." And see Loughran *v.* Des Moines (Iowa), 34 N. W. Rep. 172; Keyes *v.* Little York Gold Co., 53 Cal. 724.

Same—Same.—And so the residents of a city who lawfully connect their drains with a sewer and deposit sewage therein are not liable to a property owner on whose lands the city has created a nuisance by discharging the sewage thereon; nor are they proper parties defendant in a bill seeking to abate the nuisance by injunction. Carmichael *v.* City of Texarkana, 94 Fed. Rep. 561.

Same—Same.—But a municipal corporation which creates a nuisance upon the property of a riparian proprietor by discharging sewage into a stream flowing through the same, and the owner of gas works, who also discharges noxious matter into the same stream, while not joint tort feasors, are jointly and severally liable in damages; and a release of the owner of the gas works will not release the city from liability for damages, unless executed in full satisfaction of all the injury sustained by reason of the nuisance. City of Valparaiso *v.* Moffit, 12 Ind. App. 250, 39 N. E. Rep. 909.

Sufficiency of Complaint—Suit between States.—A bill of complaint filed by the state of Missouri in the supreme court of the United States, which alleges, in substance, that the state of Illinois and the Sanitary District of Chicago, are threatening to discharge daily fifteen hundred tons of undefecated sewage of the city of Chicago into the Mississippi river, through an artificial drainage canal constructed for that purpose, to the pollution of that stream, and the creation of a nuisance dangerous to the health and lives of all the inhabitants of the complainant state resident along the borders of said stream, presents a controversy between two of the states of the United States of which the federal supreme court can take original jurisdiction, and entitles the complainant state to equitable relief in advance of the apprehended contamination. State of Missouri *v.* State of Illinois, 180 U. S. 208, 21 Sup. Ct. Rep. 331.

Same—Negligent Grading of Streets.—A declaration which alleges that the city by unskillfully grading and paving its streets and raising them above the level of plaintiff's premises, and by unskillfully and negligently constructing a sewer, and by closing the manhole thereof, caused the overflow of plaintiff's premises, states a cause of action. City of Dallas *v.* Cooper (Tex.), 34 S. W. Rep. 321.

Same—Overflow—Negligent Construction.—In an action to recover damages sustained by the plaintiffs, occasioned by the improper and unskillful construction of certain culverts, drains, and gutters, made

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by the city and left in an unfinished state in such a careless and negligent condition that a large quantity of water was made to overflow the premises of the plaintiff, it was held that a complaint setting forth such facts stated a cause of action, and a demurrer thereto was improperly sustained. Wallace *v.* City of Muscatine (Iowa), 4 Greene 373, 61 Am. Dec. 131.

Same—Same—Same.—A complaint which alleges that the defendant municipality negligently permitted its sewer to become and remain stopped up and out of repair, so that it overflowed plaintiff's cellar and rendered his premises damp and unhealthful, states a cause of action. City of Valparaiso *v.* Cartwright (Ind.), 35 N. E. Rep. 1051.

Same—Necessary Averments.—In an action for damages caused by the overflow of a culvert, the complaint need not allege that it was built by the city, as this will be presumed. City of Peoria *v.* Crowl, 28 Ill. App. 154.

Same—Same—Percolating Water.—A complaint which alleges that the city dug a trench and refilled it with the same earth, and that the earth so replaced was more porous than it was before removal, so that the water percolated through it into plaintiff's cellar in greater quantities than before, does not state a cause of action. Dewien *v.* City of Peoria, 24 Ill. App. 396.

Same—Material Fact—Discharge of Sewage—Nuisance.—Where the question at issue is whether a sewer which terminates on a highway at a point where there is no watercourse is a nuisance, the fact that the outlet of the sewer is below the level of the highway is immaterial. Dierks *v.* Com'rs of Highways of Addison Twp., 142 Ill. 197, 31 N. E. Rep. 496.

Variance.—Plaintiff alleged that his injuries were due to negligence on the part of the city in failing to provide a proper sewer. The proof showed that the injury was caused by the overflowing of a private drain on the adjacent premises, constructed by the former owner of those premises, which had subsequently been conveyed to the trustees of a bridge held for the benefit of the city. *Held*, no recovery on account of the variance. Kosmak *v.* City of New York, 6 N. Y. S. 453, 53 Hun 329.

Objections—When Too Late.—In an action to restrain the discharge of more sewage upon the land of a licensor then he has consented to receive, an objection that the licensor has failed to prove his title, raised for the first time on appeal, is too late; it should have been urged at the trial. New York Cent. & H. R. R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. Rep. 416.

Jurisdiction.—The threatened pollution of the waters of a public navigable stream, under the laws and authority of one of the United States, by a public corporation created by and existing under the laws of that state, to the injury of certain towns, cities, and individuals residing along the banks of said stream within the limits of another state, presents a case for the original jurisdiction of the supreme court of the United States upon the one state being impleaded by the other. State of Missouri *v.* State of Illinois, 180 U. S. 208, 21 Sup. Ct. Rep. 331.

Instructions to Jury.—Where the evidence is overwhelming that the sewers were insufficient, and that the common council might, and ought to have known the fact, and that the city did not exercise reasonable care in their construction, an instruction, offered in behalf of the city, that it was not liable for injuries resulting from error in judgment of the common council as to the size of the sewers necessary for the passage of the water, was properly refused. City of Dixon *v.* Baker, 65 Ill. 518, 16 Am. Rep. 591.

In an action against a municipality for damages occasioned by the construction of a culvert of insufficient capacity to carry off all the water falling during a heavy rain, it was held to be error to refuse to give the following instruction offered by the defendant municipality: "In constructing the culvert the defendant was only required to

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use reasonable care; such as a prudent man would use under like circumstances in reference to his own property. If you, therefore, find that the city had an engineer who was competent to take charge of such work, and that the size of the culvert was left to him, and that he honestly believed in drafting the plans for the culvert, that he was making it large enough, then, even if he were mistaken, the defendant is not responsible for his mistake, and the plaintiff cannot recover." Van Pelt *v.* City of Davenport, 42 Iowa 308, 20 Am. Rep. 622.

In an action to recover for damages occasioned to the owners and operators of a mill by the overflow of a sewer, it was not error to refuse an instruction to the effect that plaintiffs could in no case recover more than the rental value of the mill during the time of making repairs. City of Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. Rep. 686.

It is not error to instruct the jury that they may take into consideration the nature and extent of plaintiff's business, and its past productiveness, not as the measure of damages sustained in the loss of future or contingent profits, but as a means of aiding them to ascertain the amount of the injuries they have already sustained. City of Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. Rep. 686.

An instruction, that if the jury should find that the back flow of water resulted from the elevation of the street, and that the culvert, though insufficient to carry off all the water in time of heavy rain, left the plaintiff's premises in no worse condition than if no culvert at all had existed, then plaintiff could not recover, is erroneous. Hitchins *v.* Frostburg (Md.), 11 Atl. Rep. 826.

If the injury complained of was caused by the backing and overflow of the defectively constructed and insufficient sewer, and would not have occurred but for such cause, then the fact that the floor of plaintiff's cellar had been lowered, afforded no justification to the defendant for the defective and insufficient sewer; and it was error to instruct the jury that the lowering of the cellar floor relieved the city from the results of its negligence. Hitchins *v.* Town of Frostburg (Md.), 11 Atl. Rep. 826.

Instructions that if the injury was due to the negligent construction of a private drain on private property, or was the result of the stoppage of the public drain, caused by the washing down of debris from private property, plaintiff could not recover, were properly refused where there was evidence to show that the private drain referred to was constructed with the knowledge and consent of the municipal authorities, and that they carelessly and negligently permitted it to be improperly constructed and allowed it to remain so with knowledge that damage was likely to result to plaintiff and to adjacent property owners. Borough of Bethlehem *v.* Haus (Pa.), 19 Atl. Rep. 437.

It is error to instruct the jury that a city is held to exercise extraordinary care in the construction and maintenance of its sewers. Netzer *v.* Crookston (Minn.), 61 N. W. Rep. 21.

It is not error to instruct the jury that under the evidence it is for them to determine whether plaintiff was guilty of contributory negligence in failing to provide his sewer connections with proper valves to prevent the water in the sewer from flowing back. Netzer *v.* City of Crookston (Minn.), 61 N. W. Rep. 21.

Where the charge delivered to the jury is a clear, full and comprehensive presentation of the law, under the facts in evidence and upon the issues involved, and the verdict is sustained by the evidence, the court will not interfere with the discretion of the trial judge in refusing to grant a new trial. Mayor, etc., of Macon *v.* Small, 108 Ga. 309, 34 S. E. Rep. 152.

In an action against a city for damages resulting from the flooding of plaintiff's cellar, the evidence showed that the city had constructed a culvert with grated openings flush with the street. The gratings having become clogged with debris while in this position, were raised to remedy the defect, but subsequently they were battered down to

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their old position by the passage of wagons and street sprinklers over them. Plaintiff's cellar was flooded during a rain in which an inch of water fell in ten minutes. The area ways to plaintiff's building were in bad repair. An engineer testified that the gratings were sufficient to carry off any rainfall such as might reasonably be expected in that locality. *Held*, that there was sufficient conflict in the evidence to warrant sending the case to the jury, and it was error to direct a nonsuit. Capital Printing Company *v.* City of Raleigh, 126 N. Car. 516, 36 S. E. Rep. 33.

In Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342, the evidence showed that when the culvert and its inlets were constructed they were entirely adequate; but in the course of time an adjoining corporation became more densely built up, causing a larger volume of water to be thrown into the gutters and discharged through these inlets. Experience began to reveal the fact on very special occasions the inlets were insufficient, and during an unusually heavy rain plaintiff's house was flooded. *Held*, that a nonsuit was properly ordered.

In an action against a city for damages caused by the overflow of a sewer, evidence was introduced tending to prove every material allegation of the complaint. *Held*, that it was not error to refuse to instruct the jury that they should find for the plaintiff unless they believed the injury resulted solely from the act of God. Haney *v.* Kansas City (Mo.), 7 S. W. Rep. 417.

In constructing drains and sewers it is the duty of the city to see that they are sufficient to carry off all ordinary rainfall, and where it is proved that the curbs and gutters are insufficient for such purpose, it is not error to instruct the jury to find for the plaintiff, although the injury complained of may in fact have been caused by the act of God. Haney *v.* Kansas City (Mo.), 7 S. W. Rep. 417.

Where the evidence goes to show that negligence other than that charged in the declaration was the proximate cause of the injury, it is not error to direct a verdict for the defendant. Pottner *v.* City of Minneapolis, 41 Minn. 73, 42 N. W. Rep. 784.

An instruction that the defendant corporation may acquire the right to empty its sewers upon the land of an individual by prescription is erroneous when there is no evidence upon which to base it. Smith *v.* Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. Rep. 907.

It is not error to refuse to instruct the jury that if they believe that there were obstructions in the creek below the mouth of the sewer, and that such obstructions caused the sewage to remain in the creek and caused the damage to the plaintiff, that he cannot recover. But an instruction, that it was the duty of plaintiff to exercise ordinary care to avoid the damages of which he complains, and that if the injury resulted from obstacles which *plaintiff* suffered to accumulate in the creek on his own land, and which he negligently omitted to remove, he could not recover, would have been proper. City of Jacksonville *v.* Doan, 145 Ill. 23, 33 N. E. Rep. 878.

In an action against a city for injury to plaintiff's property by the washing away of her lots, an instruction to the jury, that in case they should find that plaintiff's lots were washed away, as complained, the measure of damages would be the difference in value of the premises as they were just before the acts of the defendant in removing the dirt and increasing the flow of water in a certain ditch, and what they were worth after they were injured by the washing away of that portion of the lots which would not have washed away but for the acts of the defendant, while erroneous, is cured by a subsequent instruction that "defendant would be liable to plaintiff for injuries caused by said acts and for no more." Correll *v.* City of Cedar Rapids (Iowa), 81 N. W. Rep. 724.

An instruction that plaintiff could not recover if she contributed to her own injury, either by depositing filth and garbage in the street and ditch complained of, or upon her own premises, was properly refused where, in answer to special interrogatories, the jury had

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found that plaintiff threw no garbage or offensive matter of any kind upon the street or in the ditch. Correll *v.* City of Cedar Rapids (Iowa), 81 N. W. Rep. 724.

In an action against a city for a nuisance resulting from its neglecting to clean a ditch which it had converted into an open sewer, a charge, in which the judge concedes the right of the municipality to use the stream for a sewer, and states that he has no recollection of any evidence showing that the ditch was clogged up or cast out its refuse upon plaintiff's land at any time except in times of high water, but tells the jurors that the question is one of fact to be determined from the evidence as they remembered and understood it, and that if they found that the defendant, having the care of the open sewer, allowed refuse and impure matter to accumulate in the stream and upon its banks, obstructing the flowage and emitting poisonous vapors injurious to the health of the plaintiffs, defendant would be liable, is not inadequate or misleading. Owens *v.* Lancaster, 193 Pa. St. 436, 44 Atl. Rep. 559.

Plaintiff had constructed a water chute sufficient to carry the waters of a creek over his lot. Afterwards the city, by means of drains and sewers collecting the surface water, so increased the flow of water in the creek that the chute was no longer sufficient, and plaintiff's premises were overflowed with filth and noxious matter from privies situated on the creek above him. *Held*, that an instruction that the city would not be liable for any pollution resulting from the privies on the creek not placed there by its orders, or with its consent and acquiescence, was properly refused, for the reason that it did not take into consideration the fact that there would have been no damage at all had not the city turned its drainage into the stream, thereby causing it to overflow. City of Elgin *v.* Hoag, 25 Ill. App. 650.

A charge to the jury that they may assess as damages the difference between the value of plaintiff's premises before the construction of the sewer and their value after its construction is not so indefinite nor inexplicit as to constitute a ground of error. City of Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62.

Where the action was for damages caused by an obstructed sewer to three houses, two of which plaintiff rented to third parties, and occupied the third as a dwelling, an instruction allowing the jury to find compensation for any discomfort, annoyance, and loss of enjoyment sustained by plaintiff as to her own home was not misleading or improper where they had otherwise been told that they could allow nothing on account of sickness of the family or loss of time in assessing the damages to the two houses kept for rent. Louisville *v.* O'Malley (Ky.), 53 S. W. Rep. 287.

An instruction that if the use of the sewer water by plaintiff and his tenants for purposes of irrigation contributed to the injuries of which plaintiff complained, then plaintiff could not recover, was properly refused in the absence of evidence that such use of the water in any way aggravated or contributed to the injury in question. San Antonio *v.* Rivas (Tex.), 57 S. W. Rep. 855.

In a case where the leg of plaintiff's horse was broken by stepping on a brick which had been washed into the highway by the overflow of a culvert, it was error to instruct the jury that no recovery could be had because the injury was not such as could have been foreseen or anticipated as the probable result of the defective condition or insufficient size of the culvert. Hazzard *v.* City of Council Bluffs (Iowa), 44 N. W. Rep. 219.

VI. EVIDENCE.

Admissibility.—"It is always competent to show that some other person or persons may have contributed to the wrong,—not for the purpose of defeating the action, but in mitigation of damages." City of Richmond *v.* Test, 18 Ind. App. 482, 48 N. E. Rep. 610.

In Indiana municipal corporations are liable for negligence in devising the plan of a sewer, but are not liable for mere errors of judgment; hence it is error to exclude evidence by which the city

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attempts to show that the defect in the plan was due t of judgment and not to negligence. City of Terre Ha 112 Ind. 542, 13 N. E. Rep. 686.

In an action for damages for injury done by the overfl it is not error to permit one of the witnesses to give to the length of time which it will require to repair th by the overflow, the witness having been one of the ow ators of the injured mill, and familiar with its st injury sustained. City of Terre Haute *v.* Hudnut, 1 N. E. Rep. 686.

In an action for damages occasioned to a milling es the overflow of a sewer, it is not error to admit evidenc the mill was actually forced to shut down for twelve repairs, which had not yet been made, would require that the average net earnings of the mill were one hu dollars per day. City of Terre Haute *v.* Hudnut, 112 E. Rep. 686.

Evidence that since the action was begun the city water from certain streets and turned it into the sewer ing injury to plaintiff's property, is inadmissible. M burg *v.* Duffy, 16 Atl. Rep. 642, 70 Md. 47.

In an action for injuries from an overflow resulting negligent construction of sewers, evidence that the mon for the construction of the sewers was insufficient to p erty of all citizens is inadmissible, since the city is to undertake such work. Town of Frostburg *v.* Hit Atl. Rep. 380.

In an action for damage done to plaintiff's property of an alleged defective sewer, stereoscopic views take ises on the day following each of the injuries co admissible in evidence to show the damaged conditio ises. German Theological School *v.* City of Dubuque & Eng. Corp. Cas. 625.

In an action to recover damages resulting from th sewer, the testimony of an engineer that the sewer with a capacity sufficient to carry off a rainfall of tw three inches per hour, is proper evidence as to what i nary rainfall. Hession *v.* Wilmington (Del.), 27 At Atl. Rep. 749.

In an action against a city for negligence in fai sewer, want of funds with which to make repairs, if a must be pleaded, otherwise it cannot be shown in evi *v.* City of Crookston (Minn.), 61 N. W. Rep. 21.

In an action for flooding plaintiff's premises by neg open certain drains, evidence as to the condition of th confined to the particular occasion on which the i Pearson *v.* City of Duluth, 40 Minn. 438, 42 N. W. Rep

In an action to recover damages for the overflow premises, sickness and the general unhealthy conditi ises are elements of damage, and a physician may te sickness had never existed in plaintiff's family w another part of the city. Eufaula *v.* Simmons, 86 Rep. 47.

Where plaintiff alleges that the overflowing of hi sioned by the narrowing of the channel of a stream culvert, and a general denial is pleaded, the defen that the injury was caused by the narrowing of the filling in of certain lots, the plaintiff's among oth construction of the culvert. Young *v.* Kansas City, 27

In an action against a city for negligently permitti of a creek sewer to become obstructed with logs and the court pointed out to the jury the issues to be trie the recovery to the negligence charged, it was not evidence as to the condition of a drift dam, which

structed above the sewer, in order to show a failure on the part of the city to exercise due care to protect the entrance to the sewer after it had been warned of the danger of overflow. Chan Sing *v.* City of Portland (Ore.), 60 Pac. Rep. 718.

In an action against a corporation for negligence in failing to keep the intake of a creek sewer free from debris, as a result of which plaintiff's premises were injured by the overflow, it is error to permit a witness who was not present at the overflow, and who did not see the obstructed condition of the intake until the next day, to state, that in his opinion, it was caused by the city's negligence in improperly guarding the head of the sewer and failing to have a sufficient number of men to keep it free from debris; such negligence being the real question in issue and exclusively within the province of the jury. Chan Sing *v.* City of Portland (Ore.), 60 Pac. Rep. 718.

Under a complaint alleging that plaintiff's cellar was flooded by an obstructed sewer on a certain date, so that he was deprived of the use thereof for a period of ninety days, evidence as to subsequent overflows occurring shortly after the one first alleged and within the ninety day period, was properly admitted to show both the nature and extent of the overflow as well as the fact that the city had notice of the sewer's obstructed condition. Taylor *v.* City of Austin, 32 Minn. 247, 20 N. W. Rep. 157.

Evidence that another sewer of similar construction and use did not, at its outlet, produce offensive smells, was properly excluded, for the reason that the sewers may have been similar in their use and construction, and yet differ as to the consequence of their use. Randolf *v.* Town of Bloomfield, 77 Iowa 50, 14 Am. St. Rep. 268, 41 N. W. Rep. 562.

It is not error under Iowa statute to permit plaintiff, after he has rested his case, and before the argument to the jury had been commenced, to introduce evidence to show the depreciation in the rental value of the property, caused by the nuisance, the evidence having been inadvertently omitted by the plaintiff. Randolf *v.* Town of Bloomfield, 77 Iowa 50, 14 Am. St. Rep. 268, 41 N. W. Rep. 562.

In an action by the owner of a manufacturing plant to restrain a municipality from continuing a nuisance caused by the discharge of sewage into the stream on which plaintiff's factory is situated, evidence that plaintiff's foreman refused to take charge of the premises because of the stench, is not admissible to prove the stench, but is admissible to prove the fact that the foreman refused to act on that ground. And the testimony of another witness that he had refused to work on plaintiff's premises for a similar reason was not inadmissible because the refusal was made after the action was brought, although that fact might affect its weight. Platt *v.* Waterbury, 72 Conn. 531, 48 L. R. A. 691, 4 Mun. Corp. Cas. 442, 77 Am. St. Rep. 335.

Defendant was not injured by the admission of evidence that verbal notice had been given to the sewer commissioners where notice to the city was otherwise duly proved. Platt *v.* City of Waterbury, 72 Conn. 531, 48 L. R. A. 691, 4 Mun. Corp. Cas. 442, 77 Am. St. Rep. 335.

It was within the discretion of the trial court to admit evidence of the nuisance on the land and the sewers causing the same before it had been shown that the town had any share in creating or maintaining it; and proof of what it would cost to clean up the premises by removing the offensive matter was relevant to the question of damages. Watson *v.* Town of New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. Rep. 345.

On an issue as to whether or not the sewers causing the nuisance were built by the town, the annual reports of the selectmen of the town, showing what expenditures had been made for sewers, were admissible in evidence for the plaintiffs notwithstanding the selectmen might have been called as witnesses and the original books of town accounts could have been had. And a contract between the

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town and a contractor under which the sewers were constructed, was also admissible, notwithstanding it was signed only by the contractor. Watson *v.* Town of New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. Rep. 345.

Where a city is sued for damages resulting from the negligent construction and improper use of a sewer, whereby plaintiff and his family are made sick, it is competent for the city to introduce evidence showing that the sickness was caused by another stream flowing near plaintiff's premises into which a number of privy vaults emptied and which was very filthy. Loughran *v.* City of Des Moines (Iowa), 18 Am. & Eng. Corp. Cas. 329, 34 N. W. Rep. 172.

In an action against a city for filling plaintiff's docks with sewage, it is competent for plaintiff to show that the flow of sewage has been largely increased since the passage of a statute ordering the substitution of waterclosets in place of vaults and privies along the line of such sewers. Constitution Wharf Co. *v.* Boston, 156 Mass. 397, 30 N. E. Rep. 1134.

In an action against a municipality for a nuisance to plaintiff's health and property resulting from defendant's negligence in failing to clean a ditch which it had converted into an open sewer, it is not error to permit a witness to state whether or not the ditch, in the condition it was, was or was not a nuisance. Owens *v.* City of Lancaster, 193 Pa. St. 436, 44 Atl. Rep. 559.

In an action against a municipal corporation for creating a nuisance to plaintiff's premises by the discharge of sewage thereon, it is error to exclude evidence tending to show that the injury to plaintiff's premises was caused in whole or in part by the polluted condition of a stream flowing within sixteen feet of the boundary of the premises. Loughran *v.* Des Moines (Iowa), 34 N. W. Rep. 172.

In an action to recover damages for a nuisance to plaintiff's property caused by the discharge of sewage into a stream flowing by his land, it was error to admit evidence showing that the use of sewage water for irrigation purposes on the lands below the city greatly improved the value thereof when the sewage did not flow on plaintiff's land and it was impossible for him to use it. Nor does the fact that such evidence was elicited on cross-examination render it any the less incompetent. Smith *v.* San Antonio (Tex.), 57 S. W. Rep. 881.

In an action against a city for creating a nuisance by permitting the improper use of a sewer in the neighborhood of plaintiff's premises, it is competent to introduce a properly certified copy of the resolution of council authorizing such improper use to prove knowledge thereof on the part of the city. City of Champaign *v.* Forrester, 29 Ill. App. 117.

Evidence—Judicial Notice.—A court will take judicial notice that small box drains six or eight inches square, laid by a village of less than one thousand inhabitants for the purpose of carrying the surface water from its streets, are not sewers in the ordinary acceptation of the term although plaintiff may have styled them so in his brief. Dudley *v.* Village of Buffalo, 73 Minn. 347, 76 N. W. Rep. 44.

The court will take judicial notice of the fact that the sewage of a village of sixteen hundred inhabitants discharged into a small stream will pollute the water thereof, render it unfit for domestic use, and constitute a nuisance *per se*. Village of Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. Rep. 218.

The court will take judicial notice that a sewer which carries the major portion of the sewage of a village in an unnatural direction, and deposits it upon or so near a farm that laborers can not work thereon without being made sick by the unhealthy and foul smelling vapors, is a nuisance *per se*. Dierks *v.* Twp. of Addison, 142 Ill. 197, 31 N. E. Rep. 496.

Evidence—Sufficiency.—In an action to recover damages for injury to premises caused by the overflow of a sewer, evidence that plaintiff had been in possession of the premises for twenty years at the time

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of the injury, is sufficient evidence of ownership to sustain a verdict of the jury in his favor. City of Peoria *v.* Crawl, 28 Ill. App. 154.

Evidence that notice was given to the city's superintendent of streets and drains that water from the defective sewer was running into plaintiff's cellar, and that the superintendent had thought that defendant should clean out the cellar, is sufficient to support a finding that defendant had notice of the obstructed condition of the sewer. Daggett *v.* City of Cohoes, 7 N. Y. S. 882.

Evidence that the pollution complained of gave rise to noxious vapors and sickening stenches, creating sickness in the plaintiff's family and interfering with the comfortable enjoyment of his home, is sufficient to show the existence of a nuisance and warrant the submission of the case to the jury. Edmondson *v.* City of Moberly, 98 Mo. 523, 11 S. W. Rep. 990.

Where the cover to the manhole of a sewer was washed off during an excessive and unusual rainfall, and the water flowed out, flooding plaintiff's premises, evidence that there was the usual small accumulation of sand in the bottom of the sewer at the time of the storm, does not prove that the sewer had become obstructed through the city's negligence. Mayor of Baltimore *v.* Schnitker (Md.), 34 Atl. Rep. 1132.

In an action to abate a nuisance caused by defendants emptying their sewer into a small natural stream flowing through the city, plaintiff's witnesses testified that the water in the stream was very low at times, and on such occasions the filth was wont to accumulate, giving rise to noxious vapors and sickening smells. Defendants' witnesses testified that they went to the place in question, but detected no offensive odor. *Held*, that the defence of no nuisance was not made out, as it did appear that the time of the visit sworn to by the defence was the same as that sworn to by the witnesses for the plaintiff. City of Belton *v.* Baylor Female College (Tex.), 33 S. W. Rep. 680.

Evidence that the sewer when built had been connected with an old sewer so that the bottom of one was on a level with that of the other, that the old sewer was obstructed with six inches of sand and stagnant water, that a catch basin had been constructed which turned more water into the sewer than its capacity would admit of, that the overflowing sewer had been choked by an accumulation of solid matter which had been removed between the time of the overflow and the time of bringing the action, that plaintiff had repeatedly given notice of the defective condition of the sewer and that water was running into her cellar, is sufficient to warrant the submission of the question to the jury as to whether the injury complained of was occasioned by water coming from the sewer. Daggett *v.* City of Cohoes, 7 N. Y. S. 882.

Evidence—Burden of Proof.—In an action for damages caused in part by obstructions in a sewer under the highway, plaintiff must show that it was the duty of the city to keep it clear, and that if kept clear the damage would not have occurred. Collins *v.* City of Waltham, 151 Mass. 196, 24 N. E. Rep. 327.

VII. DEFENCE.

Generally.—A contract, whereby a property owner, in consideration of his being allowed to connect his drains with a storm sewer, agrees to release the city from all liabilities "for damages which may be occasioned to such estate . . . . . by the construction, use, or existence of such drain or connection," does not relieve the city from liability for injuries caused by the grading of certain streets in such a manner that additional surface water was turned into the sewer, causing it to overflow. King *v.* Granger, 21 R. I. 93, 41 Atl. Rep. 1012.

The fact that plaintiff's premises were not directly connected with the leaking sewer will not prevent his recovering for damages due to

its negligent construction and maintenance. The liab
depends not upon the assessment of his estate for
sewer, but for the injury done him by the nuisance.
of Boston, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E

A city cannot be excused for the negligent failure to
a sewer safe merely on the ground that the power to
and to prescribe the plan of construction of a m
sewer rested with the board of aldermen who have
Allen *v.* City of Boston, 159 Mass. 324, 38 Am. St.
E. Rep. 519.

In an action against a private individual for creat
by discharging his sewage into the highway, it is
the city has failed to provide a sewer, unless it appear
has not nor can devise any other mode of disposing
Town of Kirkwood *v.* Cairnes, 44 Mo. App. 88.

Where private property is injured through the negli
ipal employees in constructing a drain, it is no defe
of the city that it used due care in selecting its age
Rural Municipality (Can.), 12 Manitoba 416; Mayor
Furze, 3 N. Y. 612.

The fact that plaintiff voluntarily but not unlawfull
pipe with a public sewer is no defence to an action a
for neglecting to keep the same in repair. Daggett *v.*
7 N. Y. S. 882.

Where the overflow causing the damages was th
obstruction in the shape of a dam which the commissi
had knowingly permitted to be placed in the sewer, it is
plaintiff's premises were below the grade of the stree
City and County of San Francisco, 84 Cal. 12, 23
Cook *v.* City and County of San Francisco, 23 Pac. Re
v. City of Madison, 63 Wis. 518, 53 Am. Rep. 299.

In an action to recover damages for a nuisance ca
charge of sewage into a brook flowing through plain
it is no defence that other persons contributed to the
stream more largely than did the defendant. Wat
New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. S

Nor is plaintiff barred of his recovery because of
former years he has discharged sewage and dyes from
the premises into the brook, as his act in thus foulin
the injury of land owners below does not operate as a
owners above to use it in a similar way. Watson *v.*
Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. Re

Where plaintiff gave permission only for the con
overflow sewer on his premises, he is not estopped
action for a nuisance caused by the discharge of
through the sewer which the city has constructed i
such permission. Loughran *v.* City of Des Moines
& Eng. Corp. Cas. 329, 34 N. W. Rep. 172.

The creation of a nuisance by depositing offensi
plaintiff's own premises furnishes no excuse to a city f
another upon the street. Correll *v.* City of Cedar Ra
N. W. Rep. 724.

In an action to restrain a nuisance created by th
sewage into a natural stream, it is no defense that fi
of the sewer complained of are on private property
the control of the city. Nor is it any defense that th
which the sewer was built was not such as to auth
construct it. Stoddard *v.* Village of Saratoga Sp
Supp. 745.

Upon a bill filed to enjoin a city from continuin
open sewer which has become a nuisance, it is no d
city has no authority to enter upon private property
of abating the same. Demby *v.* City of Kingston, 14

Ultra Vires.—Where plaintiff sued for damages to h

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erty resulting from the discharge of sewage from a rock quarry into a stream flowing under his front porch, it was a good defence that the quarry was without city limits, and that the city had no authority to operate it. Duncan *v.* City of Lynchburg (Va.), 48 L. R. A. 331.

Where a sewer commissioner goes beyond his authority, and beyond any authority which the city had power to confer upon him, and commits a trespass by constructing a sewer upon private property, which sewer soon becomes the source of a private nuisance to the owner of the property, the commissioner and not the city is liable. Kiernan *v.* Jersey City (N. J.), 13 Atl. Rep. 170.

In the absence of express charter power, a contract, by which a city pays a stipulated sum for the right of way for a sewer through plaintiff's premises, and as a further consideration agrees to construct the sewer with a suitable valve to prevent the flowing back of the water in the sewer and insure the plaintiff against overflow, is *ultra vires* and void, and the city is liable for damages resulting from the negligent construction of the sewer and valve only to the extent that it would be in case the contract had never been made. Mayor of Nashville *v.* Sutherland, 19 L. R. A. 619, 29 S. W. Rep. 228, 94 Tenn. 356.

Unauthorized Connection with Sewer.—One who connects his drain with a sewer without right to do so has no standing to maintain an action for injuries caused by an overflow resulting from the negligent construction or maintenance of the sewer. Breuck *v.* City of Holyoke, 167 Mass. 254, 45 N. E. Rep. 732; Dermont *v.* Detroit, 4 Mich. 435. And where one whose cellar had been flooded offered evidence to show that he had used the sewer for nineteen years, in pursuance of a parol permission given by the mayor that many years previously, the ordinance not requiring a written permit, the question of such person's right to use the sewer was for the jury. Livingstone *v.* City of Taunton, 155 Mass. 363, 29 N. E. Rep. 635. And where one has connected his pipe with a public sewer in violation of a penal ordinance, the breaking and replacing of the pipe by a city contractor engaged in laying a pavement, is not such a ratification of the wrongful connection as will warrant a recovery for injuries from water flowing back through such pipe. City of Atlanta *v.* Ward, 78 Ga. 276. Nor is the pumping of the water from plaintiff's cellar by the municipality any waiver of his infraction of the city ordinance relative to sewer connections.

And see Buckley *v.* New Bedford, 155 Mass. 64, 29 N. E. Rep. 201, where it is said that the right of one who even voluntarily (not unlawfully) connects his drain with a public sewer extends no further than to enjoy the existing system as it is; and that if by reason of the low level of his drain and the insufficient size of the outlet of the sewer his cellar is flooded, his only remedy is to disconnect his drain.

Contributory Negligence.—Plaintiff, the owner of a coal barge, acting under the orders of the city wharf officials, moored it to a certain wharf just alongside and underneath the opening of a large sewer. A heavy shower coming up during the night, the sewer poured a large volume of water into the barge, sinking it. *Held*, that the city was guilty of no negligence whatever in the construction or maintenance of the sewer, but that inasmuch as the size of the opening would have warned a prudent man that large volumes of water were expected to flow through the sewer at times, and the approach of the unusual shower having been indicated by the heavy thunder and other atmospheric conditions, plaintiff had contributed to his own injury by leaving his boat in such a place over night. Behan *v.* Mayor, etc., of New York, 24 Fed. Rep. 239.

But where work on sewer trenches is abandoned because of the gas accumulating in the same, it is negligence in the city not to post some warning giving notice of the existence of the gas and the danger of descending into the same. And so great is the regard of the law for human life, that it will not impute negligence to one who loses his own life in an attempt to save the life of a boy who has descended to the bottom of the trench and lost consciousness from

the effect of the gas, so long as the effort was made with a reasonable regard for the rescuer's own life. Corbin *v.* Philadelphia, 195 Pa. St. 461, 78 Am. St. Rep. 825.

Whether one injured by the caving of a sewer trench in the course of the construction of a sewer was bound to know that the laying of a water pipe at that place several years before had disturbed the soil and rendered it unsafe and liable to cave upon the making of another excavation, is a question for the jury. Ostrander *v.* City of Lansing, 111 Mich. 693, 70 N. W. Rep. 332.

In the absence of knowledge on the part of plaintiff's lessor that the sewer was in a leaky condition, said lessor was under no obligation to construct a wall to keep the sewage out of his cellar. Allen *v.* City of Boston, 159 Mass. 324, 38 Am. St. Rep. 423.

The fact that plaintiff contributed to the injury complained of by depositing filth and garbage on her own premises is no excuse to a municipal corporation for maintaining a nuisance on the public streets. Correll *v.* City of Cedar Rapids (Iowa), 81 N. W. Rep. 724.

Where owing to the obstructed condition of a sewer plaintiff's cellar was overflowed on more than one occasion and his goods stored therein injured each time, it was not, as a matter of law, contributory negligence on the part of the plaintiff to allow his goods to remain in the cellar after the first influx of water. Taylor *v.* City of Austin, 32 Minn. 247, 20 N. W. Rep. 157.

The fact that a person voluntarily connected his house with the sewer in question does not estop him from bringing an action for a nuisance resulting from the maintenance of the sewer. Bolton *v.* Village of New Rochelle, 32 N. Y. S. 442, 84 Hun 281.

Where a lot owner knows that his premises will be overflowed in case of a heavy rain unless a certain drain pipe connected therewith is cleaned out, and gives no notice of its obstructed condition, he can maintain no action for damages occurring during such storm. Parker *v.* City of Laredo (Tex.), 28 S. W. Rep. 1048.

Where surface water was accustomed to flow down the slope of a very long and high hill, through ravines and well defined natural streams, the city had the right to permit it to continue to flow into the streams and ravines as it was wont to do naturally, or it could collect it into artificial drains and discharge it into such streams and ravines through storm sewers. In such case it will not be liable for damages done to the roadbed of a railway company which has obstructed the outlet to the streams and ravines by constructing an embankment at right angles thereto along the slope of the hill, and laid its track thereon without providing sufficient outlets at the points where said streams and ravines are crossed by the track. St. Paul & Duluth R. Co. *v.* City of Duluth, 56 Minn. 494, 23 L. R. A. 88.

The fact that plaintiff erected his house on land formed by the filling in of a run which had formerly been the outlet for the surface water of that locality, did not preclude him from recovering for injuries from an overflow caused by reason of the city's negligence. Mayor of Frostburg *v.* Duffy, 70 Md. 47, 16 Atl. Rep. 642.

Proximate Cause.—Where the injury to plaintiff's premises results from an improper use of the sewer which the common council has authorized in violation of a municipal ordinance, it is no defence to plead that the resolution of the council authorizing the improper use was not the proximate cause of the injury complained of. City of Champaign *v.* Forrester, 29 Ill. App. 117.

Where the water from an inadequate sewer would not have flowed upon plaintiff's premises but for a barrier which a third person had constructed to keep it off of his own premises, the overflow of the sewer and not the existence of the barrier, was the proximate cause of the injury. Martin *v.* Brooklyn, 52 N. Y. Supp. 1086, 32 App. Div. 411.

Where a city planned a sewer to extend out to deep water, either in the ocean or channel of the river, but stopped it short of such termination, piecing it out with a wooden trough or shoot, so that noxious

fumes and gases escaped, which together with the sewage thrown back by the reflux of the tide and by strong currents flowing in that vicinity, created a nuisance to the injury of plaintiff's premises, it was held that the city was liable for the results of its negligence; and it was no defence to plead the action of tides and currents as the proximate cause of plaintiff's injury. Hardy *v.* City of Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182.

Nor is a city relieved from liability for its negligence in discharging its sewage at a certain place by the fact that the construction of plaintiff's wharves and deepening of his docks has so changed the tides and currents of the harbor that they fail to carry the matter out to sea as they otherwise would do. Constitution Wharf Co. *v.* City of Boston, 156 Mass. 397, 30 N. E. Rep. 1134.

In an action against a city for negligently diverting the water from a natural watercourse while engaged in constructing a sewer, and turning it upon plaintiff's property, it is no defence that the water flowed first over intervening premises; nor that the mischief will be remedied upon the completion of the general plan of sewerage at some future day. Gift *v.* Reading, 3 Pa. Super. Ct. Rep. 359.

Where a city raises the grade of a street until it is thirty-five feet above the level of a creek crossing the same, and constructs a brick culvert for carrying the waters of the creek under the embankment so formed, the embankment itself extending laterally over the land of an adjacent owner, who raises the grade of his premises until they are on a level with the embankment, and extends the city's culvert for some distance up stream, the extension having been planned by the city engineer and being similar in every respect to the portion built by the city, the city is not liable for injuries sustained by reason of the insufficient size of the culvert as a whole, it being held that the proximate cause of the backflow of water was the extension added by the adjacent owner. Kansas City *v.* Brady, 52 Kan. 297, 39 Am. St. Rep. 349, 34 Pac. Rep. 884.

VIII. THE DOCTRINE OF NOTICE.

The duty of keeping sewers in proper repair is a ministerial one, and a municipality will be liable for injuries resulting from want of repair regardless of whether it had notice of such lack of repair or not. As regards notice of the defect, an injury resulting from the omission of a duty—a neglect to do an act incumbent upon the city—differs from the case where the injury is the result of the acts of third persons. In this latter case the city must have had, or be presumed to have had, notice. Barton *v.* City of Syracuse, 36 N. Y. 54.

Where the employees of the municipality were engaged at work in a sewer just a few days before it burst, the city's knowledge of its defective condition, or negligence in failing to discover it, will be presumed. Kranz *v.* City of Baltimore, 64 Md. 491, 2 Atl. Rep. 908.

Where, in an action for damages caused by the overflow of a sewer, the evidence showed that the catch basin was stopped up by the servants of the city, and that their attention was called to it, it was held that the city could not claim the right to be notified of the defect in such case. City of Dallas *v.* Cooper (Tex.), 34 S. W. Rep. 321.

After a notice to a corporation that a ditch constructed by it has been obstructed, it is its duty either to compel the removal of the obstruction or to provide some other means for the escape of the water. Effingham *v.* Surrells, 77 Ill. App. 460.

Where a city has once been notified of the obstructed condition of a sewer and of the damage resulting therefrom, it is liable for any subsequent damage resulting from the obstruction. Murk *v.* City of Watertown, 22 N. Y. S. 227, 67 Hun 261.

The corporation is liable for all damages resulting from obstructions in sewers after actual or constructive notice of the same. Woods *v.* Kansas City, 58 Mo. App. 272.

The court cannot say as a matter of law that the city had constructive notice of an obstruction which had existed in a drain in a remote

part of the city for three or four months. Parker *v.* City of Laredo (Tex.), 28 S. W. Rep. 1048.

IX. DAMAGES.

Elements of Damages.—In an action for injuries occasioned by an overflowing sewer plaintiff is entitled to recover for whatever damage her own movable goods sustained from the water, and such a sum of money besides as shall be the aggregate of the annual value from the time of the injury, with deduction for taxes, repairs, insurance, and rebate of interest. Harrigan *v.* City of Wilmington (Del.), 12 Atl. Rep. 779.

Plaintiffs are entitled to such damages as were the natural and probable consequence of the flooding, whatever they might be according to the proof, including the loss of goods in the cellar and the use of the cellar. Anderson *v.* Mayor of Wilmington (Del.), 19 Atl. Rep. 509.

Where the averments of a petition set forth that the acts of the defendant municipality resulted in causing "noxious exhalations and odors to pervade said premises, greatly interfering with the plaintiff's safe and comfortable enjoyment of the same," and also decreasing the rental value thereof, it is not error for the court to permit the jury, in estimating the damages, to take into consideration the contamination of a well, such damage being fairly within the allegations of the complaint. Correll *v.* City of Cedar Rapids (Iowa), 81 N. W. Rep. 724.

Under Mass. Stats. 1890, ch. 270, § 1, damages may be recovered for the loss of crops caused by the temporary diversion of water from plaintiff's premises during the construction of a sewer. Penney *v.* Commonwealth, 173 Mass. 507, 73 Am. St. Rep. 312, 53 N. E. Rep. 865.

Under a statute which provides that the city shall be liable for "damages occasioned by laying, making or maintaining a sewer, plaintiff may recover damages resulting from the draining of his well by the construction of a public sewer, although no part of the sewer was on his land, and the underground water by which his well was supplied flowed in no definite channel. Trowbridge *v.* Town of Brookline, 144 Mass. 139, 10 N. E. Rep. 796; Bickford *v.* Hyde Park, 173 Mass. 552, 73 Am. St. Rep. 320, 54 N. E. Rep. 343.

The loss of seed which plaintiff was unable to plant because of sickness resulting from a nuisance created by the discharge of sewage into a stream flowing by his premises, is an element of damages too remote to be assessed. Smith *v.* San Antonio (Tex.), 57 S. W. Rep. 881.

Permanent Injuries—Injuries Apprehended.—In an action against a city for damages done by the setting back of water from an inadequate sewer through plaintiff's private sewer, it is error to instruct the jury that they may assess damages upon the basis that the wrong done to plaintiff's property was a continuing injury, permanent in its nature, and that plaintiff was entitled to both past and prospective damages. Nashville *v.* Comer, 88 Tenn. 415, 12 S. W. Rep. 1027, 7 L. R. A. 465; Carson *v.* City of Springfield, 53 Mo. App. 289; Carmichael *v.* City of Texarkana, 94 Fed. Rep. 561.

But where the sewage complained of polluted the stream flowing through plaintiff's land, rendering it totally unfit for any use whatever, destroyed the grass and crops on his farm, and rendered his dwelling uninhabitable, which nuisance appeared to be permanent, it was held that the evidence supported plaintiff's allegations that the injuries to his land were of a permanent character, and a verdict for damages on that basis would not be disturbed. City of Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62.

But where the verdict purports to give damages for a permanent injury to plaintiff's land, it is error to include items of special damage, such as expenditures incident to sickness and money spent in digging pools for stockwater. City of Paris *v.* Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62.

Notes

In an action to recover for injuries caused by an overflow, it is proper to instruct the jury that they may assess as damages the difference between the value of a residence lot before the overflow and its value as a residence lot after the overflow. City of Eufaula *v.* Simmons, 86 Ala. 515, 6 So. Rep. 47. So where the defendant has objected to plaintiff's proposition to prove the amount necessary to repair the property. Daggett *v.* City of Cohoes, 7 N. Y. S. 882.

In an action to recover damages for discharging large volumes of water upon plaintiff's premises, leaving it to stand in stagnant pools and become a nuisance, it is proper to instruct the jury that they may look at the facts and circumstances of the case and assess such damages as they see fit. Eufaula *v.* Simmons, 86 Ala. 515, 6 So. Rep. 47.

Measure of Damages for Rent Property.—The measure of recovery for injuries to rent property caused by the discharge of sewage thereon is the decrease in the rental value of the property together with the rent actually lost. Louisville *v.* O'Malley, 21 Ky. Law Rep. 873, 53 S. W. Rep. 287; Nims *v.* Troy, 59 N. Y. 500; Arn *v.* City of Kansas, 14 Fed. Rep. 236. And plaintiff may waive the right to recover for the permanent injury and still recover for the diminished rental value during the time that the nuisance continued. City of Eufaula *v.* Simmons, 86 Ala. 515, 6 So. Rep. 47.

Same—Sickness—Loss of Time.—In an action to recover for damages caused by the discharge of noxious matter on plaintiff's premises, he is entitled to recover not only for the decreased rental value of the premises, but for loss of time and expenses incurred on account of sickness caused thereby. City of Eufaula *v.* Simmons, 86 Ala. 515, 6 So. Rep. 47; Loughran *v.* City of Des Moines (Iowa), 18 Am. & Eng. Corp. Cas. 329, 34 N. W. Rep. 172. But such damages must be specially alleged. Allen *v.* City of Boston, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. Rep. 519.

Damage from Surface Water and Sewer—Separating Damages.—Plaintiff, in violation of city ordinance, connected his private drains with the city sewer. Owing to the faulty condition of the sewer, due to the city's negligence, his cellar and foundation walls were damaged, not only by water set back through the drains which he had wrongfully connected, but by water percolating through the soil from the sewer, and running in from catch basins. *Held*, that the damage caused by the water set back through the wrongfully connected drains was not such as could be separated from that caused by the water percolating from the sewer and flowing from the catch basins in order to enable him to recover for the latter. Breuck *v.* City of Holyoke, 167 Mass. 258, 45 N. E. Rep. 732.

Set-Off of Peculiar Benefits.—Where the walls of plaintiff's cellar are damaged both by water from a defective sewer and by water flowing over the sidewalk in consequence of a change of grade in the street, it is proper to setoff the benefits accruing to the property from the change of grade against the damages resulting from the overflow. City of Atlanta *v.* Ward, 78 Ga. 276. But in Mayor of Brunswick *v.* Tucker, 103 Ga. 233, 29 S. E. Rep. 701, where the damage was due to the city's negligence in permitting its sewer to become obstructed, it was held that the increased market value because of the improvement could not be setoff against the loss of rent and the decrease in the rental value of the property. In Dallas *v.* Cooper (Tex.), 34 S. W. Rep. 321, it is said that the peculiar benefit to the property accruing by reason of the improvement may be setoff against the damages if specially pleaded.

Duty to Keep Down Damages.—A person must take proper precaution and use all ordinary means to prevent the flooding of his premises and to keep down damages after they are flooded. He can recover for only such damages as he could not have prevented by the exercise of ordinary care. City of Dallas *v.* Cooper (Tex.), 34 S. W. Rep. 321; Mayor of Macon *v.* Small, 108 Ga. 309, 34 S. E. Rep. 152; O'Brien *v.* City of Worcester, 172 Mass. 348, 52 N. E. Rep. 385.

WILSON *v.* CITY OF WATERBURY. D. B. WILSON CO. *v.* SAME. (*Two Cases*).

(*Supreme Court of Errors of Connecticut, Dec. 18, 1900.*)

[47 Atl. Rep. 687.]

Sewers—Flooding of Cellar*—Contributory Negligence.*—Where plaintiffs' sewage pipes drained into a sewer constructed and controlled by a municipality, and which became full during certain storms, causing the sewage to flow back into plaintiff's cellar, but plaintiffs were negligent in not making proper connection with the sewer, the city is not liable for the injuries sustained.

Sewers—Surface Drainage—Adoption of Plan*—Failure to Carry Out Plan in Full.*—A city adopted a plan for a system of sewerage, whereby sewers were to be constructed for house sewage, and a certain brook enlarged and utilized for surface drainage. The sewers were constructed, but the brook was never used in the manner contemplated in the plan, and during times of storms overflowed, whereby plaintiffs sustained injury. *Held* that, if the part of the plan which was executed was not shown to have increased the flow of the brook, the city would not be liable for injuries sustained, since it might carry out the plan in whole or in part, in its discretion.

Same—Same—Same—City Not Liable for Overflow Resulting from Condition Which It Did Not Directly Create.*—A city adopted a plan for a system of sewerage, whereby sewers were to be constructed for house sewerage, and a certain brook enlarged and utilized for surface drainage. The sewers were constructed, but the brook was never used in the manner contemplated in the plan, and during times of storm overflowed, whereby plaintiffs sustained injury. *Held*, in an action for damages, that, notwithstanding the increase in the flow of the brook came indirectly from the subsequent growth of the city, it was not liable for failure to put the brook in condition; it not being shown that the city directly created the conditions causing such increase.

Case reversed from superior court, New Haven county; Ralph Wheeler, Judge.

Actions by David B. Wilson and by the D. B. Wilson Company against the city of Waterbury. On reservation from the superior court, judgment advised for defendant.

Three separate actions to recover damages for injuries to property, brought to the superior court in New Haven county, at Waterbury. Facts found by the court (R. Wheeler, J.), and cases reserved for the consideration and advice of this court. Judgment advised for the defendant. The material facts found applicable to each of these cases are, in substance, these: The plaintiffs were the occupants of certain lands and buildings fronting upon East Main street, in Waterbury, at the time of the injuries complained of. At that time, and long before, the city of Waterbury, under its charter, had the power, conferred upon it at its own request, to construct sewers, and to take and use any natural water course or brook as a sewer, and to put it in condition for such purposes, and to condemn land for such purposes. Little brook is a natural

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *notes*, 2 Mun. Corp. Cas. 641; 3 Mun. Corp. Cas. 59; 3 Mun. Corp. Cas. 313; 3 Mun. Corp. Cas. 455; 1 Mun. Corp. Cas. 77; 1 Mun. Corp. Cas. 162; 4 Mun. Corp. Cas. 188.

water course, running through the city from north to south, passing through the property of the plaintiffs and others, and crossing under certain city streets, and emptying into Great brook. In 1882 the city adopted a plan for a general sewerage system, and soon after entered upon the construction of a part of that system. Among other things, this plan provided (1) that the sewers should be used only for house sewage and part of the roof water; (2) that Little brook should be taken and used as a part of the plan, and that its channel should be deepened, widened, straightened, and put and kept in condition to carry off harmlessly all surface water within its drainage area, except such roof water as might be admitted into the sewers; (3) that this work upon Little brook should have relation to the construction of sewers in North and East Main streets and their connections, "and should fully meet and anticipate all the needs and requirements of the rainfall and surface drainage of the watershed of that brook, in view of the serious effects of heavy rains likely to be caused by the extension, the grading, and paving of streets, the construction of gutters leading directly into the brook, and the increase of dwellings." The North and East Main street sewers were laid in 1884, and are insufficient to accommodate any considerable quantity of surface water in addition to sewerage and roof water. Before the injuries complained of the city had substantially completed its sewer system. "Since the construction of the sewers a large number of new buildings have been erected upon the territory drained by Little brook, a number of new streets have been opened, streets have been paved to some extent by the defendant, and gutters laid along the sides of some of the streets directly into the brook. In consequence of the improvements made, a large quantity of surface water has been drained into the brook, which before the improvements did not reach this natural outlet so quickly, or in such volume, and perhaps did not reach it at all, because it percolated into the soil." Before and at the date of the injuries complained of the brook had become incapable, during ordinary heavy rains, of carrying off harmlessly all the water that flowed into it. This resulted in part from the increased flow of surface water into it as hereinbefore stated, and in part from its lessened natural capacity, caused by obstructions of various kinds in its channel at divers points where it crosses private property. The brook could easily have been made sufficient to carry off harmlessly all water flowing into it. Prior to the injuries complained of the city never took and used the brook in the manner contemplated in the plan, and never did anything to its channel where it crossed private property to make it capable of meeting the increased demands upon it in times of heavy rain storms. The city knew that the brook overflowed and did harm during such storms. In February, 1896, and in July, 1897, there were heavy rainstorms which caused the brook to overflow and do the damage here in question.

These were ordinary storms, and the overflow occasioned by them and the harm done thereby might have been reasonably expected. These are the material facts found upon this part of the case.

The plaintiffs also claim that the setback of water from the East Main street sewer during these same storms contributed to the harm done by the brook. The material facts found as to this matter are these: The plaintiffs' rainwater leaders and sewage pipes drained into the East Main street sewer through a common outlet in plaintiffs' cellars. The East Main street sewer empties into the North Main street sewer. The city, contrary to the plan adopted in 1882, had turned some surface water into the North Main street sewer. During these storms the latter sewer became so full that it impeded the flow of sewage in the East Main street sewer, and caused such sewage to set back against the plaintiffs' check valve at the common outlet aforesaid, and closed the outlet. In consequence of this, some of the plaintiffs' sewage and roof water was held back and forced out into the plaintiffs' cellars, and mingled with the water from the brook. If the plaintiffs' check valves had been properly placed, this injury from their own pipes would not have occurred, and this they might have known by reasonable inquiry. The general questions reserved are whether, upon the facts found, the city is liable for the injury caused by the overflow of the brook, or by the setback of water from the sewer.

Lucien F. Burpee and Wilson H. Pierce, for plaintiffs.
John O'Neill and John P. Kellogg, for defendant.

TORRANCE, J. (after stating the facts). The plaintiffs claim that the city is liable for the damage done to their property (1) by the water from the brook; (2) by the water set back from the sewer.

The last claim will be first considered. As the water from the brook filled the cellars to overflowing, it would seem as if the actual injury from the setback of the sewer water must have been very slight; and, indeed, the claim upon this point was not very strongly pressed upon the argument. Upon the facts found upon this point, we think that whatever damage the plaintiffs may have suffered from this source was due to their own fault in making connection with the sewer. They might have so placed the check valve as to have avoided the particular damage from this source of which they now complain, and they are chargeable with knowledge that the connection which they made with the sewer was of such a nature as to be likely to produce such damage. Whatever injury the plaintiffs suffered from the sewer was due mainly to their own negligence, and for such damage they cannot recover from the city. Upon the question whether, in the absence of negligence on the part of the plaintiffs, the city would be liable, upon the facts found, for damages caused by the setback of water in the East Main street sewer, we express no opinion.

The next question is whether the city is liable, upon the facts found, for damage done by the overflow of the brook. The reasons for the claim that the city is liable are stated in the plaintiffs' brief in substance as follows: (1) Because it had neglected to complete the system of sewage disposal approved and adopted in 1882, and which included Little brook as an essential part, and required that it should be put in condition, throughout its entire length, to carry off harmlessly all surface water from its drainage area in times of storm; (2) because it had made numerous public improvements, in consequence of which a large quantity of surface water had been drained into said brook which would not otherwise have reached it, or would not have reached it so quickly, and had not put and kept the channel in a condition to accommodate these additional requirements. No reasons in support of this claim other than these were suggested upon the argument, and no others are suggested by the record; so that, if these fail to support it, as we think they do, the claim is without foundation.

The first reason does not support the claim. It is true the finding shows that the improvement of Little brook was a part of the general plan adopted in 1882, and that, although the city has substantially carried out the plan in other respects, it has not carried out that part of it relating to this brook; but from this alone it by no means follows that the city is liable for the consequences flowing from its failure to execute this part of the plan. The city was at liberty to carry out the plan, in whole or in part, at such times as it saw fit. The mere fact that it laid a sewer in one street did not make it liable for not laying one in another street, and the mere fact that it laid sewers in its principal streets did not make it liable for harm caused by its neglect or failure or refusal to put Little brook into the condition contemplated by the plan. In short, the mere fact that it adopted a plan, and executed a part of it, does not make it liable for failing to execute some other part of it. The city had the power to utilize and improve Little brook as a part of its sewer system, but no law makes it liable for merely refusing or failing to exercise that power. If the fact had been found that the part of the plan which was executed had necessarily so increased the flow of the brook as to make it incapable of carrying off such flow harmlessly, that would present a question different from any now in the case; but no such fact is found, and it is clear from the finding that the increased flow of the brook between 1882 and 1897 was in no way caused by the part execution of the general plan. It follows from this that the first reason does not support the claim.

The second reason advanced in support of the plaintiffs' claim is, in effect, this: that the city, in the ways described in the finding, caused the increased flow in the brook, and is therefore liable for not putting the brook in condition to carry

it off harmlessly. This reason has no foundation in fact. The city emptied no sewage into the brook, and it led into it no water coming from outside of its drainage area. The increase came indirectly and incidentally from the growth of the city. It was caused in part by the erection of buildings, and the opening and paving of streets, and the surface water as such flowing therefrom into the brook, and in part by the surface water collected in highway gutters leading directly into the brook. It is true that this condition of things was anticipated and provided for in that part of the plan adopted relating to Little brook, and the city had the power to prevent harm resulting from this condition by executing that part of the plan, but there is no law which imposed upon it liability for such harm because of its failure to exercise that power. It might possibly be liable for consequences resulting from such failure if it had directly created the conditions in question, but there is nothing in the finding to show that the city did directly create them, in any such sense as to make it responsible for them. In all that the city, in its corporate capacity, did within the drainage area of this brook, in opening and paving the streets and gutters, it was performing a governmental duty, and, in all that it did in disposing of the surface water in those streets in performance of that duty, it appears to have acted within its rights and in a reasonable manner. Under such circumstances, it is not responsible for incidental harm resulting from such performance. Judge v. City of Meriden, 38 Conn. 90; Bronson v. Borough of Wallingford, 54 Conn. 513, 9 Atl. 393; Byrne v. Town of Farmington, 64 Conn. 367, 30 Atl. 138; Downs v. City of Ansonia, 73 Conn. 33, 46 Atl. 243. In no proper sense, then, can it be said that the city caused the increased flow of water in the brook in times of rain. But even if it could be shown that the city had wrongfully diverted some of its street surface water into the brook by highway gutters, and so contributed to the burden of the brook, this, though it might possibly make it liable for such wrong to one injured by it, would not make it liable for not putting the brook into the condition contemplated by the plan; and it is for its failure to do this that this suit is brought, and not for a mere wrongful diversion of water into the brook.

Upon the facts found, then, we think that the acts of the city, within the drainage area of the brook or elsewhere, were not the cause of the increased flow of the brook, in any such sense as to make the city liable for failing to widen, deepen, and otherwise change its bed and channel, as was contemplated in the general sewerage plan. It had and has the power to do this at its discretion, but, upon the facts found, it is not liable for the consequences flowing from a mere failure to exercise that power. The superior court is advised to render judgment in each case for the defendant. The costs in this court to be taxed in favor of the defendant. The other judges concurred.

CITY OF LOUISVILLE *v.* GIMPEL.

(Court of Appeals of Kentucky, Dec. 20, 1900.)

[59 S. W. Rep. 1096.]

Inadequate Sewer*—Presumption of Notice.—Where the section of the city in which plaintiff's property was located had been repeatedly flooded from an inadequate sewer prior to the injury complained of, the jury was authorized to conclude that the city might, by the exercise of ordinary care, have discovered that the sewer was inadequate.

Same—Instructions.—The court properly refused an instruction exempting the city from liability unless it knowingly suffered or permitted the sewer to become inadequate, as the city was responsible if the inadequacy of the sewer was known, or could have been known by the exercise of proper care.

Same—Same.—Defendant city was not entitled to an instruction exonerating it from liability for extraordinary rainfalls, there being no proof of any such rainfalls within the time sued for.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by George Gimpel against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant.

James Garrison, for appellee.

HOBSON, J. Appellee recovered in the court below against the city of Louisville $500 damages for the flooding of his property at the corner of Walnut and Twentieth streets by reason of the insufficiency of the sewer leading out Twentieth street to take off the water. The proof shows that this sewer runs into what is called the "outfall sewer," and this had become stopped up near its mouth by the silt from the river, and had only about one-third of its natural capacity. This obstruction had been accumulating for years, and finally got so heavy as to break the sewer. After this it was removed. By reason of it, appellee's property, and the section of the city about it, had been flooded from time to time in 1896 and 1897, and the trouble continued throughout the greater part of 1898, when the outfall sewer was at last cleaned and repaired. Under the proof the city was charged with notice of the insufficiency of the sewer on Twentieth street, and put upon inquiry to ascertain the cause. It seems that proper care might have located the trouble; at least we are of opinion that before 1898 the city should have done this, when a boat was used on this street at every hard rain, and admittedly the trouble had existed for years, and could have been remedied in a few months, as was afterwards done.

The instructions of the court fairly presented to the jury

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *notes*, 1 Mun. Corp. Cas. 77; 1 Mun. Corp. Cas. 162; 4 Mun. Corp. Cas. 188; 3 Mun. Corp. Cas. 59; 3 Mun. Corp. Cas. 313; 3 Mun. Corp. Cas. 455.

the law of the case, and under the proof we are unable to see that there was any substantial error in its refusal to give the instructions asked by appellant. The first instruction asked by appellant exempted the city from liability unless it knowingly suffered or permitted the sewer to become inadequate. The city was responsible if the inadequacy of the sewer was known, or could have been known by the exercise of proper care. The second instruction exonerated the city from liability for extraordinary rainfalls. There was no proof of any such rainfalls within the time sued for. The rainfalls causing the injury were such as might reasonably be expected. The third instruction was objectionable for the same reason as the first, and the failure to give it could not have prejudiced the city; for, as we have stated, it is evident from the proof that the trouble might have been remedied by the city before the injury sued for occurred, if, when this district was time and again flooded, steps had been taken with reasonable diligence to ascertain and remove the cause. The fourth instruction was substantially given by the court, and we do not think the evidence offered by the city was sufficient to justify the giving of the fifth.

We see no error in the admission of testimony. Though the evidence offered by the city as to the skillfulness of its engineer was at first rejected by the court, it was subsequently admitted. Judgment affirmed.

ADAMS *et al.* *v.* CITY OF MODESTO.

(*Supreme Court of California, Feb. 4, 1901.*)

[63 Pac. Rep. 1083.]

Sewers—Nuisance*—Construction of Code Provision.—Under Civ. Code, § 3479, declaring that anything injurious to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life and property, etc., is a nuisance, an open wooden trough, passing about 300 yards from plaintiff's house, and constituting part of the sewerage system of the city, through which, for a distance of about 450 yards, the city sewage passed, constituted a nuisance, entitling plaintiff to its abatement.

Presentation of Claims—Statute Requiring Does Not Apply to Claims Arising Ex Delicto.—Municipal Corporation Act, § 864 (St. 1883, pp. 266 *et seq*), declares that all "demands" against a city or town of the sixth class shall be presented and audited by the board of trustees, etc. *Held* that, though the term "demands" was sufficiently broad to include claims for torts as well as on contracts, yet the purpose of the act being that the claim should be audited, which could not apply to claims for torts, the act did not require presentation of a claim for damages for the maintenance of a nuisance as a condition precedent to the plaintiff's right to sue thereon.

Open Sewer*—Nuisance*—Damages—Judgment Not Sustained by the Evidence.—In an action for the abatement of an open sewer as a nuisance, where plaintiff alleged that he was damaged by the conduct

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*See *note* to Mayor, etc., of City of Waycross *et al.* *v.* Houk, *ante*, p. 421; cross-reference *note* to Wilson *v.* City of Waterbury, *ante*, p. 466.

Adams *v.* City of Modesto

of sewage through the sewer, and by discharge of the sewage over land adjacent to plaintiff's, but the finding of the court, by which damages were allowed, referred only to the running of the sewage through the sewer, and there was no evidence to show the amount paid for doctor's and medicine bills for sickness alleged as an element of damage and the evidence did not show that plaintiff had not been able to rent the property because of the sewer, that part of the judgment awarding damages was not supported by the evidence.

In bank. Appeal from superior court, Sacramento county; William O. Minor, Judge.

Reversed on condition.

For opinion in department, see 61 Pac. 957.

PER CURIAM. Appeal from a judgment in favor of the plaintiffs for the abatement of a nuisance and for damages, and from an order denying a new trial. The plaintiffs are owners of a tract of land in the city of Modesto, on which, until a short time before the commencement of the suit, they resided with their family. The nuisance complained of is an open wooden trough, passing about 300 yards from the plaintiffs' house, and constituting part of the sewerage system of the city, through which, for a distance of about 450 yards, the sewerage matter of the city is passed. This the court found was a nuisance, interfering with the comfortable enjoyment and obstructing the free use of the plaintiffs' property, and that the plaintiffs were damaged thereby in the sum of $650.

That the use of the open sewer by the city in the vicinity of the plaintiffs' land constituted a nuisance, and that the plaintiffs were entitled to have it abated, is too clear to require discussion. Civ. Code, § 3479; Peterson v. City of Santa Rosa, 119 Cal. 392, 51 Pac. 557; Lind v. City of San Luis Obispo, 109 Cal. 343, 344, 42 Pac. 437; Wood, Nuis. § 781, note 1.

With regard to damages, it is objected that the demand was not presented to the board of trustees, as required by the provisions of section 864 of the municipal corporation act (St. 1883, pp. 266 et seq.), applying to cities of the sixth class, of which the city of Modesto is one, which provides that "all demands against such city or town shall be presented and audited by the board of trustees," etc. But we do not think this provision was intended to apply to cases of this kind. The term "demands" is, indeed, sufficiently broad to include all claims, whether arising from contract or tort; but, when used in this connection, the term does not usually include demands of the latter class. 15 Am. & Eng. Enc. Law, p. 1194. That the term is here used in the narrower sense, as referring only to demands arising from contract, and for determinate amounts, is shown by the purpose for which they are required to be presented, which is that they may be "audited," —a term that is not applicable to demands arising from torts. Law Dictionaries of Anderson, Abbott, Black, Wharton, etc.; Cent. Dict.

We do not think, however, that the finding as to damages is sustained by the evidence. In the complaint it is alleged not only that the sewage matter of the city was conducted through the trough, but that it was habitually discharged upon and spread over the land toward the land of the plaintiffs, and the damages claimed were alleged to proceed jointly from both causes,—that is, not only from the use of the sewer, but from "running the sewage on the ground"; and the testimony of the plaintiff David Adams is to the same effect. But the finding of the court refers only to the running of the sewage through the trough, and nothing is said about the discharge of the sewage on the ground, and there is nothing in the testimony to determine how much proceeded from the latter and how much from the former cause. The testimony of the plaintiff is also otherwise indefinite. He speaks of sickness in his family caused by the nuisance, which "entailed doctor bills and medicine bills," but no amounts are given. He says, also, he "lost the use of the place for two years," and that he could have rented it for $250 a year if it hadn't been for the sewer. But the place contained about 20 acres of land, and its use, except as a dwelling place, could not have been lost by reason of the nuisance complained of; and, indeed, the witness expressly says he "lost the use of it because [he] didn't care to improve it." The plaintiffs were undoubtedly damaged, but the evidence fails to show they were damaged in the amount found or in any other ascertainable amount. A new trial must therefore be granted, unless the plaintiffs prefer to release the damages.

The order denying the defendant's motion for a new trial is therefore reversed, unless the plaintiffs, within 30 days after notice of the filing of the remittitur, file their stipulation in writing, agreeing that the judgment be modified by striking therefrom the part thereof that relates to damages. Upon the filing of such stipulation, the judgment shall be modified accordingly, and as thus modified shall stand as affirmed.

HAMLIN *v.* CITY OF BIDDEFORD.

(*Supreme Judicial Court of Maine, June 4, 1901.*)

[49 Atl. Rep. 1100.]

Sewer—Establishment—Consent of Common Council—When Superfluous.—The records of the city council of the city of Biddeford clearly establish the fact that the common council originally opposed the construction of the sewer in question, while the mayor and aldermen insisted upon the proposition to build it, and through a committee of conference finally succeeded in procuring the assent of the common council. The oral evidence satisfactorily shows that it was constructed by the street commissioner, at the expense of the city, under the immediate direction of the mayor and aldermen. *Held*, that this action of the mayor and aldermen was not invalidated by the superfluous assent of the common council.

Hamlin *v.* City of Biddeford

Sewer—Construction and Maintenance*—Ministerial Duties.*—*Held* that, while the sewer complained of continued to be used for the flow of the drainage designed to pass through it, it was the duty of the city to maintain and keep it in repair; and although no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a *quasi* judicial discretion, under powers specially conferred by statute, the duty of keeping the common sewers in repair and free from obstruction after they have been constructed and have become the property of the city under such authority is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill; and there is no difference in these duties, whether the city has acquired the right to maintain the sewer by prescription, or has laid it under the statute.

Same—Same—Duty to One Who Has No Right to Use and Whose Premises Are Not Connected Therewith.—*Held*, that the plaintiff had no private drain connected with the sewer in question, and was not entitled to drainage through it according to the provision of the statute; but he sustained damage by reason of the injury to the foundation of his stable and the land across which the sewer was laid, caused by the neglect of the city to keep the sewer in proper repair, and thus, upon obvious principles of justice, as well as upon authority, he is entitled to recover in this action.

Statutes.—This case is not affected by chapter 268 of the Public Laws of 1901.

(Official.)

Report from supreme judicial court, York county.

Action by John B. Hamlin against the city of Biddeford to recover damages for defendant's failure to keep and maintain a sewer running through plaintiff's premises in proper repair. Submitted on report. Judgment for plaintiff.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and FOGLER, JJ.

F. W. Hovey, for plaintiff.

J. F. Burnham, for defendant.

WHITEHOUSE, J. This is an action on the case to recover damages alleged to have been sustained by the plaintiff through the failure of the defendant city to maintain and keep in repair a plank sewer, laid across the plaintiff's premises, situated on the westerly side of Granite street, and between Granite street and Hill street, in the city of Biddeford.

It is contended, in behalf of the city, that the sewer in question is not one for which the city had any legal responsibility, either with respect to its original construction or its subsequent maintenance and repair.

The statute law of the state regulating the construction and maintenance of "drains and common sewers" is found in chapter 16 of the Revised Statutes.

Sections two and three of this chapter are as follows:

"Sec. 2. The municipal officers of a town may, at the expense of the town, construct public drains or sewers along or across any public way therein, and through any lands of

*See *note* to Mayor, etc., of City of Waycross *v.* Houk, *ante*, p. 421; cross-reference *note* to Wilson *v.* City of Waterbury, *ante*, p. 466.

persons or corporations, when they deem it necessary for public convenience or health, and they shall be under their control.

"Sec. 3. Before the land is so taken, notice shall be given and damages assessed and paid therefor as is provided for the location of town ways."

Section 4 authorizes abutters upon the line of a public drain and the owners of contiguous private drains to enter and connect with it, on application to the municipal officers and paying therefor what they determine. It further provides that the written permits given to the applicant so to enter the drain shall run with the land without further payment.

Section 9 provides "that after a public drain has been constructed, and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it. * * * If such town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for his damages thereby sustained."

Section 10 requires that "all proceedings of municipal officers aforesaid shall be at their legal meetings," and that "a suitable record shall be made of all such permits, exhibiting the persons and lands to which they apply."

By virtue of these provisions of the statute the authority to lay out and construct public drains and sewers, as well as the subsequent control over them, is clearly vested, not in the city or town as a corporation, but in the "municipal officers," as representatives of the general government. There is no statute in this state conferring such authority upon the city or town, or upon any officials as agents of the city or town. Nor is such authority necessarily incident to the exercise of its corporate powers or the discharge of its corporate duties. True, the work must be done "at the expense of the town." A proper system of drainage so directly concerns the public health that the legislature has deemed it just and right to equalize the burden of constructing sewers by requiring payment to be made from the municipal treasury. But, in exercising the authority conferred upon them by the statute, "the municipal officers act, not as agents of the town, but as public officers intrusted with a large discretion and appointed by law to exercise absolute control over the subject-matter." Gilpatrick v. City of Biddeford, 86 Me. 534, 30 Atl. 99, and cases cited. In this respect "they act upon their own responsibility and are not subject either to the control or the direction of the inhabitants of the town." Bulger v. Inhabitants of Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205; Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373; Brunswick Gaslight Co. v. Brunswick Village Corp., 92 Me. 493, 43 Atl. 104.

If the plaintiff would recover by virtue of the provisions of

this statute, it is, therefore, incumbent upon him to show that the sewer in question was constructed by the municipal officers of Biddeford, acting, not as agents of the corporation, but as public officers in obedience to general law; that the city thereby became bound to maintain and keep it in repair, "so as to afford suitable flow for all drainage entitled to pass through it"; and that by reason of its failure to keep it in repair it became liable in this action for the damages sustained by the plaintiff.

It is not in controversy that the sewer was constructed in 1878 at the expense of the city, and the evidence shows that it was built under the direction of the mayor and aldermen and the joint standing committee on streets, composed of members of both branches of the city council. It is not in controversy that it has been deemed and treated by the city as a part of its system of sewers from the time of its construction to the commencement of this action. The records of the city council of Biddeford, composed of the mayor and aldermen and common council, disclosed certain proceedings by the concurrent action of both branches, purporting to be an approval of a proposition to have this drain constructed, and the final report of the committee of conference appointed by the two branches to consider the matter appears to have been a recommendation that the drain should be built, and this report of the committee was accepted by both branches of the city council. The subject-matter undoubtedly received the attention of both branches, but the action taken by them never assumed the form of a direct vote instructing the street commissioner to build the drain, or giving any directions in regard to the manner of building it. In this respect the situation was analogous to that described in Gilpatrick v. City of Biddeford, 86 Me. 534, 30 Atl. 99. In that case the court said:

"The ordinance of the city of Biddeford, making it the duty of the street commissioner to superintend the building and repair of sewers and make contracts therefor, * * * obviously was not designed as an attempt to usurp the powers vested in the mayor and aldermen by the general statute. It was doubtless primarily intended to apply to the construction of sewers in the public streets, for the safe condition of which the city was responsible. Its peculiar terms were probably the result of a misapprehension in regard to the law. So far as it would have the effect to take away the authority and discretion of the municipal officers respecting the building of sewers wholly outside the limits of the street, the ordinance, being unauthorized either by the city charter or by general law, is manifestly void. * * *

"The concurrent action of the city council, in referring the matter to a committee and recommending the construction of this drain, may further indicate a failure to distinguish between the municipal officers and the city council, or a mis-

conception of the duties of the two branches. But a vote to build the sewer, nor an instruction to ar build it. It was, rather, an approval of a general p for the completion of several sewers, and it was na cident to their joint action in appropriating and rai sum of money to be expended on the work as r general law."

It is true that there is no record of any formal v mayor and aldermen in the case at bar authorizir struction of the drain, apart from such concurrent co-ordinate branch of the city council. But the rec establish the fact that the common council original the construction of the drain, while the mayor an insisted upon the proposition to build it, and thro mittee of conference finally succeeded in procuring of the common council. The oral evidence sa shows that it was constructed by the street commi the expense of the city, under the immediate direc "mayor and aldermen," acting, however, to some conjunction with the committee on streets.

A similar question arose in Woodbridge v. Ci bridge, 114 Mass. 483, and the court held that the o mayor and aldermen for the construction of a com was within the power conferred upon them by th "and was not invalidated by the superfluous ass common council."

In Collins v. Holyoke, 146 Mass. 298, 15 N. E. objected that the sewer was "built under the super direction of a committee, composed of four mem common council and three aldermen"; but the that the statute, which gave the mayor and alderm ity to make the sewer, "did not preclude them fro ing agents to supervise and direct the work," an validity of their assessment was "not affected by th they called in another person to assist them in m

It is true that in Darling v. Bangor, 68 Me. 108 used the following language touching this question as a distinct and separate body is one thing; for persons to act in connection with and as a part body is another and a very different thing. A dra have the sanction of the statute, unless it is bu authority and under the sole responsibility of the bo provided, and in pursuance of the provisions th scribed." But that was an action to enforce the law liability of the defendants, and the observat quoted was obiter dictum, not necessary to the deci case. It is, therefore, not a precedent requiring t observe the rule of stare decisis.

"The primary and fundamental idea of a munici ration," says Judge Dillon, "is an institution to re administer the internal concerns of the inhabi

defined locality in matters peculiar to the place incorporated, or at all events not common to the state or people at large; but it is the constant practice of the states, in this country, to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions that are not strictly or properly local or municipal in their nature, but which are, in fact, state powers, exercised by local officers within defined territorial limits. * * * In theory the two classes of powers are distinct, but the lien which separates the one from the other is often difficult to trace." 1 Dill. Mun. Corp. § 21.

In view of this composite character and diversified authority of a municipal corporation, it might be anticipated that ordinary municipal officers would sometimes fail to observe the distinction between their functions as agents of the corporation and their powers and duties as representatives of the public law of the state. By virtue of the statute, the authority to lay out and construct public drains is vested in the municipal officers, and the exercise of their authority does not require the assent of the other branch of the city government; but the work must be done at the expense of the city, and the act of appropriating and raising the money required to defray this expense does involve the co-operation of both branches of the city council. In making their adjudication upon the necessity of a given sewer, the mayor and aldermen are not subject to the direction or control of the city council; but in performing such judicial functions it would not be illegal, but often highly proper and necessary, to confer with the other branch of the council respecting the amount of the appropriation reasonably available for that purpose.

In the case at bar, the mayor and aldermen doubtless undertook in good faith to discharge a duty imposed upon them by law for the public use and benefit. They may not have had a very clear apprehension in regard to the precise nature and limitation of their authority, but they evidently intended to have the sewer in question laid out and constructed at the expense of the city, and in such a manner as to render the city chargeable for its subsequent maintenance and repair; and under all the circumstances the work may not unreasonably be held to have been done under the direction of the municipal officers acting, not as agents of the city, but as public officers in the exercise of power conferred by general law.

It is, accordingly, the opinion of the court that, while the sewer complained of continued to be used for the flow of the drainage designed to pass through it, it was the duty of the city to maintain and keep it in repair; and although "no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion, under powers especially conferred by statute, the duty of keeping the common sewers in repair and free from

obstructions after they have been constructed and have become the property of the city under such authority is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill; and there is no difference in these duties, whether the city has acquired the right to maintain the sewer by prescription, or has laid it under the statute." Bates v. Inhabitants of Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; Emery v. City of Lowell, 104 Mass. 13; Child v. City of Boston, 4 Allen, 41, 52, 81 Am. Dec. 680.

Attention may here be called to chapter 268 of the Public Laws of 1901, amendatory of section 2 of chapter 16 of the Revised Statutes, declaring that the municipal officers shall not construct any public sewer until it shall be authorized by a vote of the town, and an appropriation made for the purpose; but, since "actions pending at the time of the passage or repeal of an act are not affected thereby" (Rev. St. c. 1, § 5), no further consideration need be given to this amendment.

In the case at bar, the plaintiff had no private drain connected with the sewer in question, and was not entitled to drainage through it according to the provision of the statute; but he sustained damage by reason of the injury to the foundation of his stable and the land across which the sewer was laid, caused by the neglect of the city to keep the sewer in proper repair, and this, upon obvious principles of justice, as well as upon the authorities cited, he is entitled to recover in this action.

After a careful examination of the testimony relating to the nature and extent of the injury, it is the opinion of the court that just compensation therefor will require—

Judgment for the plaintiff for $75.

THOMAN *v.* CITY OF COVINGTON.

(*Court of Appeals of Kentucky, May 2, 1901.*)

[62 S. W. Rep. 721.]

Sewers—Injury to Private Property*—Constitutional Provision.—Under Const. § 242, providing that municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, a city is liable for injury to private property in the construction of a sewer.

Same—Same—Sufficiency of Petition.*—A petition alleging that defendant city has so constructed its sewers that they are inadequate to carry off the surface water which accumulates, whereby plaintiff's property is injured, does not state a cause of action, there being no allegation that the sewers caused the water to accumulate.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

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*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; cross-reference *note* to Wilson *v.* City of Waterbury, *ante*, p. 466.

Thoman *v.* City of Covington

Action by Mary Thoman against the city of Covington to recover damages for injury to property. Judgment for defendant, and plaintiff appeals. Affirmed.

B. F. Graziani and James P. Tarvin, for appellant.
F. J. Hanlon, for appellee.

PAYNTER, C. J. The appellant owned a house and lot on the northeast corner of Baker and Lewis streets, in the city of Covington. Because the surface water flowed into her cellar and cistern, and over her premises, thus damaging them, she brings this action against the city. She avers that there were four sewers opening at the intersection of the streets named; that the openings were inadequate to carry off the surface water running thereto; that the officers, employees, and agents of the city knew of this fact; that, by reason of the inadequacy of the sewers to carry off the flow of surface water, it repeatedly overflowed the sidewalk on Lewis and Baker streets, flooding her cellar and grounds; that the surface water remained in the cellar, and formed a pond on her lot, sometimes cutting off ingress and egress, thus causing serious damage to her property. It is not averred in the petition that the construction and maintenance of the sewers by the city changed the flow of the surface water so as to cause it to accumulate and flow into the cellar and on the premises of appellant. She seeks to recover because the sewers are inadequate to carry off the surface water which accumulates at the point in question, regardless of the fact as to whether the construction of the sewers caused it to accumulate there and flood her premises.

It is insisted on behalf of the appellee that if the streets were constructed according to a plan adopted by the city, although they produced the injury in question, still no cause of action would arise in favor of the appellant for the injury which she sustained by the overflow of the surface water on them; that the action could only be maintained in case that the sewers were defectively constructed, thus causing the injury complained of. In support of counsel's contention, various sections of Dill. Mun. Corp. are cited. The rule announced by Dillon with reference to the liability of cities for injuries caused to property in the construction of streets and sewers no longer obtains in this state. In City of Henderson v. McClain (Ky.) 43 S. W. 700, 39 L. R. A. 349, the court had under consideration section 242 of the constitution, which provides that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by them. In that case the court held that this section manifested an intention to change the organic law of the state, and that if a municipal corporation in making improvements does injury or destroys private property compensation must be made, unless consent has been

given. This court in City of Mt. Sterling v. Jephson, 53 S. W. 1046, said: "It is insisted for the city that it is not liable for changing the grade of the street, and thus throwing the surface water on appellee. We are referred to Dill. Mun. Corp. §§ 798-800, as sustaining this view, the city being authorized by law to open and grade the streets. The question of the liability of the city in such a case was determined by this court in the case of City of Henderson v. McClain, 43 S. W. 700, 39 L. R. A. 349, and several subsequent cases, in which it was held, under section 242 of our present constitution, that the rule stated by Dillon in the sections referred to is not in force in this state. Under these decisions, the petition in this case was sufficient, and the proof warranted the submission of the issues to the jury."

Under the rule announced in the cases cited, if the construction and maintenance of these sewers changed the course of the surface water, and caused it to accumulate at the point in question, and overflow the property of appellant, she would be entitled to maintain an action to recover such damages as she sustained by reason thereof. She failed to aver this state of facts, and the proof which she offered only tends to support the averments of her petition. If the surface water accumulated at the point in question, and overflowed her premises, independent of any act of the city, she could not maintain an action against it therefor. The city must do some act which produces the injury to enable the injured party to recover against it. The sewers may have been inadequate to carry off the surface water which accumulated, still may not have had anything to do with its collecting at the point in question. To maintain an action, it was incumbent upon her to show that the sewers not only failed to carry off the surface water so as to relieve her premises from it, but that they were the cause of its accumulating there. We are of the opinion that the plaintiff failed to make out a cause of action against the city, and the court properly instructed the jury to find for it. The judgment is affirmed.

HENDRIE *et al. v.* CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1901.*)

[60 N. E. Rep. 386.]

Defective Sewer*—Vendee of Property Which Was Exempted from Assessment by Contract between Former Owner and City Not Estopped to Maintain Action for Damages.—Rev. Ord. Boston 1885, c. 27, § 15, provides for a payment by all land benefited by sewer connections before the connection is attached. Plaintiff's predecessor in title agreed with the street commissioners to deed certain land to the city in consideration that nothing be paid for sewer assessments on the property subsequently purchased by plaintiff. Permission to make a connection was issued by the sewer department, and, before purchasing,

*See *notes* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; cross-reference *note* to Wilson *v.* City of Waterbury, *ante*, p. 466.

plaintiff inquired at the sewer department and the collector's office, and was informed that there were no sewer assessments against the property. *Held*, that it was no defense to an action by plaintiff for damages caused by defects in the sewer that he had not paid for the connection; the city still holding the land conveyed by plaintiff's predecessor.

Exceptions from superior court, Suffolk county; Elisha B. Maynard, Judge.

Action by Joseph A. Hendrie and another against the city of Boston. From a judgment in favor of plaintiffs, defendant excepts. Exceptions overruled.

Charles W. Bartlett and Elbridge R. Anderson, for plaintiffs.

Samuel M. Child, for defendant.

HOLMES, C. J. This is an action for damages caused by the overflow of a sewer which was allowed to get out of repair and choked by the negligence of the defendant. The sewage backed up through the plaintiff's drain, and the only defence relied upon is that his drain was not lawfully connected. The ground of the contention is that there was no payment before entering the drain, at the rate of two cents per square foot of all land benefited by the connection, as required by the Revised Ordinances of Boston (Rev. Ord. 1885, c. 27, § 15).

The plaintiff's predecessor agreed with the street commissioners (St. 1870, c. 337, § 2) and the head of the sewer department that he would convey land within the lines of Talbot avenue, where the sewer ran, in consideration that nothing be paid for sewer assessments on this property or for the right to enter the sewer, and conveyed the land. Livingstone v. City of Taunton, 155 Mass. 363, 29 N. E. 635. This land the city still holds, and in no way has repudiated the bargain except as its counsel now attempts to do so. Subsequently it was voted by the aldermen, with the approval of the mayor, that the assessments for this sewer be "assumed by the city on account of said estates not being benefited by said sewer." Sheridan v. City of Salem, 148 Mass. 196, 19 N. E. 172. A permit to connect the premises with the sewer was issued by the sewer department, and the plaintiff before purchasing went to the collector's office and to the sewer department and inquired whether there were any assessments or charges against the land and was answered no.

It does not seem necessary to do much more than to state the facts. If for any reason the city had a right to repudiate its bargain, and if the issue of the permit was beyond the power of the sewer department, contentions to which we give no encouragement but simply do not consider further than to repeat that the city still holds the land conveyed to it, until he had notice to the contrary the plaintiff had a right to rely upon the information which he received, and to assume that he was entitled to protection as one lawfully connected with the sewer.

Exceptions overruled.

JOHNSON *v.* WALSH *et al.*

(*Supreme Court of Minnesota, April 26, 1901.*)

[85 N. W. Rep. 910.]

Defective Sewers*—Personal Injuries—Instructions.—Certain alleged erroneous instructions to the jury in this action, which is one to recover damages for personal injuries alleged to have been caused by the negligence of defendant, are considered, and *held* to present no reversible error.

Same—Same—Presumption of Negligence Arises When.—The mere fact that an accident happens and a person is injured raises no presumption of negligence, except in those instances where the thing causing the accident is shown to be in the possession and under the control of the person charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management thereof use proper care.

(Syllabus by the Court.)

Appeal from district court, Polk county; William Watts, Judge.

Action by John G. Johnson against Thomas F. Walsh and others. Verdict for defendants. From an order denying a new trial, plaintiff appeals. Affirmed.

H. Steenerson and Chas. Loring, for appellant.

De Forest Bucklen and A. R. Holston, for respondents.

BROWN, J. This is an action to recover damages for personal injuries alleged to have been received by plaintiff by falling into an unguarded and unprotected sewer trench in one of the streets of the city of Crookston. Defendants had a verdict in the court below, and plaintiff appeals from an order denying a new trial. The short facts are as follows: In August, 1898, defendant city of Crookston ordered a sewer laid along one of its streets, and let the contract for the construction thereof to defendants Walsh & Kennedy. In performance of the contract, Walsh & Kennedy entered upon such street, and excavated a trench or ditch therein for the purpose of laying the sewer. Plaintiff is a laborer, and in going to and returning from his work crosses the street on which and at the point where the trench or ditch for the sewer was so excavated. It is alleged in the complaint that defendants negligently and carelessly left such excavation open and unguarded, and that plaintiff, while crossing such street, being unaware of the excavation and of its dangerous condition, fell into it and was injured. The answer denied the negligence of defendants, and claimed that on the occasion of plaintiff's injury the excavation was properly guarded and protected. Defendants also alleged in their answer that plaintiff was guilty of contributory negligence. The verdict of the jury establishes the fact that the defendants were not negligent in the premises, and that plaintiff was guilty of con-

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421.

tributory negligence. The evidence taken in the court below is not returned to this court, and the assignments of error all refer to alleged erroneous instructions to the jury. It is not claimed that the verdict is not sustained by the evidence, but it is contended that the errors complained of with respect to the charge to the jury were prejudicial to plaintiff, and that a new trial should be granted.

It is not necessary to make special or separate reference to all the assignments of error, some of which are of such minor consequence as to require no notice at all. There was evidence tending to show that another person had fallen into the sewer trench the same evening plaintiff received his injury, and with reference to this evidence the court charged the jury not to take into consideration the accident to such other person. Plaintiff complains of this, and contends that the evidence of the accident to the other person was competent, and should not have been thus withdrawn from the consideration of the jury. The trial court was right. The fact was wholly irrelevant and immaterial, tended in no degree to show that the place were plaintiff fell into the trench was dangerous, unguarded, or unprotected, nor did it tend to show notice to the city, for it occurred at about the time of plaintiff's accident. The evidence was wholly unlike that in the case of Morse v. Railway Co., 30 Minn. 467, 16 N. W. 358. In that case it was shown that other engines and cars missed the track at about the point where the accident complained of happened, and tended to show that the railroad track was defective at that point. The fact that another person fell into the trench in question in the case at bar (whether at the point where plaintiff fell in or not does not appear) would have no tendency to show that the trench where plaintiff met with his accident was unguarded or unprotected. The trench or excavation was, of course, dangerous and unsafe, being, as it was, in one of the streets of the city, and it was the duty of the defendants to properly guard and protect it, and whether they complied with this duty was a question of fact for the jury to determine. If it had been shown that the other person fell into the ditch at the point where plaintiff did, it might possibly have been pertinent evidence, but it was not so shown.

The court charged the jury that no presumption of negligence arose from the fact that an accident happened and plaintiff was injured. This instruction is in accord with the law of this state. "The mere fact that an accident happens has no tendency to prove negligence, but an accident may be of such a nature as to raise a presumption of negligence. * * * Thus, * * * where the thing causing the accident is shown to be in the possession and under the control of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management thereof use proper care." Olson v. Railway Co., 68 Minn. 155, 71 N. W. 5. In the case at bar no pre-

sumption of negligence arose from the fact th into the ditch. It was incumbent upon him t show negligence on the part of defendants in guarding and protecting the same.

Taking the whole charge together, we discov cial error with respect to what the court said the subject of plaintiff's contributory negligen subject of the interest of witnesses Harris and fourteenth assignment of error is disposed of b of this court in the case of Kostuch v. Railway 459, 81 N. W. 215.

Counsel for plaintiff in his address to the jury question as to the liability of organized towns this nature, claiming that such towns were n clear the minds of the jury on this subject, th court instructed them that with respect to there was no difference between a town and a both stood on an equal footing. This was e plaintiff, and it is urged as reversible error. as to the liability of towns in such actions was to any issue in the case, and should not have to by the trial court. However, it is clear that resulted from the charge. The jurors were in or confused, and, though the court may have in its view of the law, the error was not of a subs had no reference to any question in the ca ground for a new trial.

The practice of a trial court in its charge of argument of counsel, and refuting theories of vant to the case, advanced in the discussion not to be commended. Arguments of coun limited to the immediate issues in the case, quently take wide range in the field of oratory. entitled to much latitude in this respect, an attempt to correct erroneous statements of la their addresses to the jury, the trial court shoul with charging the jury on the subject of the pr their consideration. Its full duty will be pe issues presented by the pleadings be clearly de cise questions of fact for the consideration and of the jury be succinctly and tersely stated, to clear and full analysis of the law applicable to s careful examination of the entire record prejudicial error, and the order appealed from i

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CITY OF SOUTH BEND *v.* TURNER.

(*Supreme Court of Indiana, April 16, 190*

[60 N. E. Rep. 271.]

Appeal—Specification of Error Too General, When.— sets out demurrers to each paragraph of the complaint

City of South Bend *v.* Turner

they were overruled by the court, to which ruling defendant excepted, such general exception reserves no question on appeal.

Appeal—Specifications of Error—What Objections May Be Urged for First Time in Appellate Court.—Where, on appeal, error is assigned, in that the complaint does not state a cause of action, only the absence of essential averments, or the presence of averments that destroy plaintiff's right of recovery, may be raised for the first time on appeal; and mere inadequacy or uncertainty of averment, which might have been amended on motion, will be deemed waived.

Sewers*—Personal Injuries—Negligence of City and Independent Contractor†—Insufficiency of Complaint.—Where a city and a construction company were sued for injuries, a complaint averring that defendants, in building a sewer, constructed a manhole, which they negligently left uncovered, and allowed sand piles to remain in the vicinity, which attracted children to play, so that as plaintiff, with other children, was playing in the sand piles, he fell through the manhole and was injured, did not show that the construction company was an independent contractor, or that the street was so obstructed as to be inconsistent with public use, so that it failed to state a cause of action against the city.

Same—Same—Contributory Negligence in Children.—Plaintiff sued a city and construction company for injuries received by falling through an open manhole in a sewer. The jury found, in answer to special interrogatories, that the construction company had exclusive possession of the street for the purpose of building the sewer, that such company frequently warned boys away from a sand pile near the open manhole, that plaintiff knew that the manhole was there and uncovered, and that he was 6½ years of age. *Held*, that the special answers did not show contributory negligence, so as to entitle defendant city to judgment notwithstanding a general verdict for plaintiff.

Personal Injuries—Physical Examination of Plaintiff.—Where a plaintiff, a child 9 years of age, sued for injuries received 2 years before the trial, and defendant had had no opportunity to learn of the nature or extent of the injuries, defendant's request that the court order a physical examination, which could be made without discomfort, humiliation, or danger to plaintiff, was improperly refused.

Appeal from circuit court, Marshall county; A. C. Capron, Judge.

Action by Bennie Turner, suing by his next friend, against the city of South Bend and another. From a judgment in favor of plaintiff, defendant city appeals. Reversed.

O. M. Cunningham, T. E. Howard, and Joseph G. Orr, for appellant.

F. J. Lewis Meyer and Chas. P. Drummond, for appellee.

HADLEY, J. Suit by appellee to recover damages for personal injuries. The facts set forth in the complaint are substantially as follows: On the 8th day of April, 1894, the defendants, being, respectively, a municipal and a private corporation, were engaged in the construction of a trunk sewer for the defendant city through one of its public streets, declining northward, and terminating in St. Joseph river. That at a point near its terminus the defendants constructed a manhole, circular in form, and 2½ feet in diameter, near the center of a public street crossing, thus constituting a means of communication with said sewer from the surface of the

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; cross-reference *note* to Wilson *v.* City of Waterbury, *ante*, p. 466.

†See *notes*, 5 Mun. Corp. Cas. 374.

street to the bottom of said sewer, a distance of 2
said manhole was carelessly and negligently per
defendants to be open and uncovered on said
and had been carelessly and negligently perm
defendants to be and remain open and uncovered
prior thereto for many days and weeks, witho
or warning of any kind, and without any protecti
lawfully upon the street. That said sewer, fron
terminus to the manhole, and for some distance
been in part completed, and large piles of sand h
upon the street where the sewer was completed,
hole, by the defendants, and had been by them
negligently permitted to remain there, and were
and did, attract children for the purpose of eng
in the sand. That the children in the neighb
accustomed, with the knowledge of the defendar
the street with said sand piles. That the plai
day, being 6½ years of age, was so engaged at
sand piles, and at the time did not know of th
tion of the manhole, and while so engaged in pl
in the exercise of due care and caution, did, by
negligence of the defendants as aforesaid, fall i
manhole, and was precipitated to the bottom
without fault, and without any warning by the
the danger existing by reason of the open
whereby he was greatly injured.

The complaint is in four paragraphs. The
drawn. The second and third are, in substan
The fourth charges that the manhole at the
accident was, and had been for many days and
gently suffered by the defendants to be and
ciently covered, etc. The joint demurrer of th
and the separate demurrer of the defendant city
graph of the complaint were overruled, and a jo
to both rulings reserved. Upon issues joined
turned a general verdict for appellee, and answ
interrogatories. The city alone appeals, and ass
(1) the insufficiency of the facts stated to constit
action against it; (2) the action of the court in
demurrer to each paragraph of the complaint;
ing its separate motion for judgment in its favor o
to interrogatories; and (4) in the overruling of
motion for a new trial.

No question upon the complaint is properly
the demurrers. The record shows that "th
demur to each paragraph of the complaint," etc.
three separate papers, being the separate demur
fendant city to each the second, third, and four
of the complaint, and the record then proce
demurrers the court overruled, to which ruling
defendants except." Exceptions taken thus in

no question, and the assignment of error predicated thereon by one of the exceptors is futile. Johnson v. McCullock, 89 Ind. 270, 273; Telegraph Co. v. Trissal, 98 Ind. 566, 570; Walter v. Walter, 117 Ind. 247, 249, 20 N. E. 148; Elliott, App. Proc. § 788.

Appellant, however, makes an independent assignment of error that the complaint does not state facts sufficient to constitute a cause of action against it. The total absence from the complaint of any averment of some fact or facts essential to the existence of the cause of action, or the presence of some averment that absolutely destroys the plaintiff's right of recovery, may be for the first time raised in this court by an independent assignment of errors, under section 346, Rev. St. 1881 section 346, Burns' Rev. St. 1894; section 343, Horner's Rev. St. 1897); but mere uncertainty or inadequacy of averment, such as might have been amended and cured upon motion seasonably made, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection, and who brings his complaint for the first time after the cause of action has been strengthened by the verdict of a jury and the presumption indulged in favor of the decisions of the trial court upon the motions for judgment and for a new trial. Shoemaker v. Williamson (at this term) 59 N. E. 1051, and authorities cited; Kinney v. Dodge, 101 Ind. 573; Smith v. Smith, 106 Ind. 43, 45, 5 N. E. 411. This assignment of error challenges the complaint as an entirety, and if any paragraph thereof is sufficient the assignment must fail. Buchanan v. Lee, 69 Ind. 117; Caress v. Foster, 62 Ind. 145; Miller v. Billingsly, 41 Ind. 489, 492. The complaint avers that the defendants were constructing the sewer; that they had constructed the manhole; that the defendants negligently permitted the manhole to be and remain open and uncovered on the day of the plaintiff's injury, and to so be and remain open and uncovered continuously for several weeks prior thereto, and negligently permitted a large sand pile, which defendants had produced, to be and remain on said day, and for several weeks prior thereto, near the manhole, and at a point on said sewer where the same was completed, with the knowledge that the children in the neighborhood, including the plaintiff, were accustomed to play in said sand pile. There is no suggestion in the complaint that the defendant construction company was an independent contractor, nor that it had the exclusive possession of the street; nor does it appear, from anything averred, except for the presence of the sand pile, that the public was prevented or in any way denied the usual right of play or travel in the street. Even assuming, as appellee argues, that the facts pleaded show that the street was so obstructed by the construction of the sewer as to be inconsistent with public use, and that the construction company was necessarily in the exclusive possession of the street, the city would not thereby

be relieved of liability, when it is shown that it had notice, or might have had notice by the exercise of proper oversight, that its licensee had acted in a negligent manner, and left its streets in an unsafe and dangerous condition. Staldter v. City of Huntington, 153 Ind. 354, 362, 55 N. E. 88; Senhenn v. City of Evansville, 140 Ind. 675, 40 N. E. 69; City of Indianapolis v. Doherty, 71 Ind. 5; Elliott, Roads & S. (2d Ed.) § 634. We are unable to see why the complaint is not sufficient against the city if tested by demurrer, and it is clearly so when questioned for the first time in this court.

With respect to the motion for judgment on the answers to interrogatories notwithstanding the general verdict, the rule is that all reasonable presumptions must be indulged against the special answers and in support of the general verdict, and if the general verdict, thus aided, is not in irreconcilable conflict with the answers, it must stand. Railway Co. v. Creek, 130 Ind. 139, 142, 29 N. E. 481, 14 L. R. A. 733; Assurance Co. v. Wilson, 132 Ind. 278, 283, 31 N. E. 938; Railway Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774; Stone Co. v. Summit, 152 Ind. 297, 53 N. E. 235. The reason of the rule is that the jury is required to pronounce upon all the issuable facts proven in the case, while the court, in testing the force of isolated facts disclosed by answers to interrogatories, does not know and cannot know what other facts touching the same matters were rightfully before the jury to justify their verdict. Therefore, in conceding to the jury the presumption of right judgment, to overthrow its general verdict, the special facts returned must be of such a nature as to exclude the possible existence of other controlling facts, provable under the issues, relating to the same subject. The answers show that the construction company had exclusive possession of the street at the manhole for the purpose of building the sewer, that said company frequently warned boys away from playing in the sand pile near the open manhole, that the plaintiff knew that the manhole was uncovered, and that he was 6½ years of age; and from the answers it is contended that it affirmatively appears that the plaintiff was guilty of contributory negligence, and the city free from liability. If there were no other answers supportive of the general verdict, we could not approve the contention. We could not assume that a boy 6½ years of age was so advanced in knowledge as to be able to know when he was in a place where he ought not to be, and to appreciate the evidences and presence of danger (Railway Co. v. Klee, 154 Ind. 430, 56 N. E. 234); nor would the isolated fact that the construction company had the exclusive possession of the street for the purpose of building the sewer prevail, as a defense for the city, against the presumptions that would arise under the averments of the complaint that both the construction company and city carelessly permitted the manhole to remain open and uncovered near a sand pile that they knew was attractive to children, and to

which they knew children were attracted for play, continuously for many weeks. But by other answers it was found that the plaintiff at the time of the accident did not have intelligence enough to know the danger of the open manhole, nor was it shown that he was ever warned of the danger by any one. It is further shown that the manhole had been completed for four weeks; that it was within 4 feet of a sand pile 7 feet high, and had been left continuously for two weeks uncovered, with the knowledge of both the city and the construction company, and with their further knowledge that the sand was attractive to the children of the neighborhood, and that they were attracted to it for the purpose of play; that there were no guards or barricades about the manhole, nor on the street or sidewalks, and the street from the manhole to the mouth of the sewer was for two weeks prior to the accident traveled by hundreds of people; that the sewer was completed from its mouth to the manhole and for 300 feet beyond at the time of the accident, except the leveling of the street grade. The motion for judgment upon the answers to interrogatories was properly overruled.

The first ground urged for a new trial is the refusal of the court, upon appellant's motion, to order a physical examination of the plaintiff. Before the commencement of the trial, appellant filed and presented its verified motion that the court select some competent, responsible, and unbiased physician and surgeon of the county to examine the head, leg, and eye of the plaintiff before the beginning of the trial, for the purpose of discovering and giving testimony as to the true character and extent of his injuries, and their probable effect, as to permanency, upon his mind and person; that the plaintiff is a child 9 years of age, and was but 7 years of age when he received the alleged injuries, and the defendant has had no opportunity and has been wholly unable to inform itself upon the subject of said injuries; that the plaintiff asserts in his complaint that his skull was cracked, his eyes injured, his leg broken, his nervous system impaired, and that his said injuries are great and permanent; that the plaintiff will produce as a witness in his own behalf the physician who attended him in his illness, and the defendant is totally unable to produce any witness who has examined the plaintiff, and who can state from medical knowledge the nature and extent of his injuries, and the probability or improbability of their permanency; that the plaintiff's father be permitted to be present at such examination; that such examination will be able to determine the true nature and extent and probable effect of such injuries, and may be made without pain, humiliation, or danger to the plaintiff. The overruling of this motion presents a question of some difficulty, and upon which the courts of the country are not entirely agreed. It is one, too, that has but recently engaged the attention of the courts of last resort. The fundamental principle, however, is an ancient doctrine

of the common law, limited, it is true, to a few classes of cases (among them, mayhem and divorce cases, wherein impotency was charged); but as the sources of evidence have been extended, to parties and in many other ways, its application has been expended to meet new conditions. The doctrine rests upon the principle that justice is the object of judicial investigation, and that courts charged with its administration, as a necessary means of attaining that end, have inherent power to require the production of the most infallible evidence. That its application to personal injury cases is a modern practice does not disprove its common-law origin. As was well said by Justice Brewer in his dissenting opinion in Railroad Co. v. Botsford, 141 U. S. 258, 11 Sup. Ct. 1003, 35 L. Ed. 740: "The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries which now form an important part of such litigation were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and the common-law courts to compel a personal examination was in many cases often exercised and unchallenged. Indeed, wherever the interest of justice seemed to require such an examination, it was ordered." Beginning with the case of Loyd v. Railroad Co. (decided in 1873) 53 Mo. 509, there have followed many adjudications upon the power of the trial court to order a physical examination of the plaintiff in suits for personal injuries upon the request of the defendant. In this first case the power, upon slight consideration, was denied. In 1877, in the well-considered case of Schroeder v. Railroad Co., 47 Iowa, 375, the power was affirmed. Following this lead, the states of Alabama, Arkansas, Georgia, Kansas, Kentucky, Michigan, Missouri, Minnesota, Nebraska, Pennsylvania, Ohio, Texas, and Wisconsin have reasserted the rule as announced in the Iowa Case. Railroad Co. v. Hill (1890) 90 Ala. 71, 8 South. 90, 9 L. R. A. 442; King v. State (1893) 100 Ala. 85, 14 South. 878; Sibley v. Smith (1885) 46 Ark. 275; Railway Co. v. Dobbins (1895) 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; Railroad Co. v. Childress (1889) 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808; Hall v. Town of Manson (1896) 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; Railroad Co. v. Thul (1883) 29 Kan. 466; Line Co. v. Allen (Ky. 1898) 44 S. W. 89; Graves v. City of Battle Creek (1893) 95 Mich. 266, 54 N. W. 757; Shepard v. Railway Co. (1885) 85 Mo. 629; Sidekum v. Railway Co. (1887) 93 Mo. 400, 4 S. W. 701; Owens v. Railroad Co. (1888) 95 Mo. 169, 8 S. W. 350; Hatfield v. Railroad Co. (1885) 33 Minn. 130, 22 N. W. 176; Stuart v. Havens (1885) 17 Neb. 211, 22 N. W. 419; Hess v. Railroad Co. (1890) 7 Pa. Co. Ct.

R. 565; Turnpike Co. v. Bailey (1881) 37 Ohio St. 104; Railway Co. v. Langston (1898) 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; White v. Railway Co. (1884) 61 Wis. 536, 21 N. W. 524; O'Brien v. City of La Crosse (1898) 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831. These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its orders all persons and things that will afford the most reliable evidence. In quasi recognition of this power it is the law of this state, and other states, so far as we have observed, that the court may permit the plaintiff, in both civil and criminal cases, to exhibit to the jury such weapons, implements, clothing, and wounds upon his person, or upon the person of the prosecuting witness, as are asserted to be the means or effects of the violence complained of. Car Co. v. Parker, 100 Ind. 181, 199; Railway Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Hess v. Lowrey, 122 Ind. 232, 23 N. E. 156; Railroad Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627; Thrawley v. State, 153 Ind. 375, 55 N. E. 95. Such things, when a part of the res gestæ, serve a most useful purpose in assisting the jury to a proper application of the testimony. They are unerring exponents of the truth of the particular fact, and it may not be controverted that when the nature, extent, and effect of a palpable injury is in dispute, not involving scientific questions, the jury may arrive at a more accurate knowledge of the truth by the aid of their own senses than by a verbal description of the observations of others. This being well known to the plaintiff, he is certain to avail himself of this advantage in the trial when the truth will be beneficial to him; and, if impartial justice is to be administered, we see no way of its attainment in all cases if an important source of evidence is open to one and closed to the other. That the question embraces the exercise of scientific knowledge makes no difference. Physicians and surgeons, however honest and learned, are fallible, and equally, with other honest and honorable persons, subject to the unconscious influence of friendships and personal interest; the latter, in the surgery cases, involving not only professional reputation, but pecuniary liability. Besides, surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be equally strong in perception, or equally accurate in observation or in measurements, and thus form different judgments of the existing conditions, which of necessity must constitute the basis of their scientific opinions; and it may be readily seen that if a defendant must make his defense against the expert opinions of the

plaintiff's chosen surgeons, without an opportunity of testing the verity of the basis for such opinions, he may be placed at a disastrous disadvantage, such as the law cannot and does not sanction.

The cases above cited as affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health or the infliction of serious pain; (5) that the refusal of the motion when the circumstances appearing in the record present a reasonably clear case for the examination, under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding. The discretion lodged in the trial court, as fairly deducible from the decisions, is a sound discretion, based solely upon legal considerations. When serious and permanent injuries are claimed by the plaintiff, and he or she has submitted to examination by a chosen physician or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury are to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify a denial of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff, on the one hand, and probable injustice to the defendant, on the other, the law will not hesitate; the court, in making such orders, with respect to time, place, and persons, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit.

So far as our researches have revealed, the federal supreme court, Justices Brewer and Brown dissenting, now stand alone in denial of the power. Railroad Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734. The decisions of New York were confused, and the rule both affirmed and denied in inferior courts, until established by legislative enactment in 1893. Laws 1893, c. 721; Code Civ. Proc. § 873. The power was first denied in the state of Missouri in Loyd's Case, supra, in 1873, but affirmed in the same court in Shepard's Case,

supra, in 1885, and affirmance has been adhered to in many subsequent cases. In Illinois the supreme court, in 1882, in Parker v. Enslow, 102 Ill. 272, disposed of the question in a single line, as follows, "The court had no power to make or enforce such an order," and in subsequent decisions, while not expressly overruling the Parker Case, recognized the existence of the power when properly and timely invoked. See Railroad Co. v. Holland (1887) 122 Ill. 461, 13 N. E. 145; Bridge Co. v. Miller (1891) 138 Ill. 465, 28 N. E. 1091. The decisions in Indiana, in the words of the majority opinion of the federal supreme court in the Botsford Case, supra, "are conflicting and indecisive." In the first appearance of the question before this court in any form, in 1885, in Railway Co. v. Falvey, 104 Ind. 409, 416, 417, 3 N. E. 389, 4 N. E. 908, in ruling upon the competency of evidence touching the details of a physical examination of the plaintiff under an order of court, made upon the defendant's motion, the right of the trial court to make the order is not questioned. Kern v. Bridwell, 119 Ind. 226, 21 N. E. 664, was an action for slander for charging the plaintiff with lewdness. The court refused to order the plaintiff to submit her person to examination by medical experts. The question related to a collateral matter, and not to the subject-matter of the suit,—to a source of evidence not shown to be reliable or useful to the defendant in his answer of justification,—and should not be accepted as an authority in a suit by a plaintiff to recover damages for a particular injury to his person. The question came before the court in Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, and the request for an examination denied because untimely made. The court, by Mitchell, J., said: "It is undoubtedly true that the court may, in its discretion, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons, when necessary to ascertain the nature, extent, and permanency of injuries." The case of Railroad Co. v. Brunker, 128 Ind. 542, 26 N. E. 178, presenting a like question, was ruled by Hess v. Lowrey, supra. In Pennsylvania Co. v. Newmeyer, 129 Ind. 409, 28 N. E. 860, the question we have here came before the court for decision, and it was there held that the power of the court to order an examination did not exist; the court regarding what was said in Hess v. Lowrey as obiter. Upon further, and perhaps fuller, consideration of the question, we are satisfied that the decision in the Newmeyer Case upon this point is refuted by the great weight of authority, and it is therefore disapproved. It is insisted that the question should be ruled by the decision of the federal supreme court but adopted as our own language, used by Montgomery, J., in Graves v. City of Battle Creek, 95 Mich. 266, 54 N. W. 757, with respect to the Botsford decision: "This case is entitled to very great weight, but, in view of the manifest justice of a requirement that a plaintiff

in a case of personal injury shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon the subject." In the case at bar the motion of the defendant was timely. The injuries were alleged to be serious and permanent, as affecting both the body and mind of the plaintiff. The plaintiff would produce in his own behalf his attending physician. The defendant had no opportunity to inspect the injuries, or in any way inform itself as to their nature, extent, and effect, and was wholly unable to contest, if it should be contested, the testimony of the plaintiff's expert witness. An examination by skilled and unbiased physicians would enable them to determine the nature and extent of the injuries, and, at least in a degree, to determine their effect and permanency, and could be made without danger or pain to the plaintiff. The application was made before the trial began, more than two years after the infliction of the injuries, and clearly presents a case where the trial court should have exercised its discretion in favor of the motion. For error of the court in overruling the motion, the appeal must be sustained. Judgment reversed, with instructions to grant appellant's motion for a new trial.

WELSH *v.* CITY OF FRANKLIN.

(*Supreme Court of New Hampshire, Merrimack, March 15, 1901.*)

[48 Atl. Rep. 1102.]

Defective Culvert or Sluiceway*—Personal Injuries—When Time for Filing Claim Will Be Extended.—Where plaintiff fell and was injured on the sidewalk of defendant city, and the evidence was conflicting as to whether the accident was caused by a hole in the walk or by ice thereon, and there was doubt as to whether the place of injury was a culvert or a bridge, sufficiently important questions were involved, so that on a showing by plaintiff that she was unavoidably prevented from filing her claim within 10 days, as required by Pub. St. c. 76, § 7, she was entitled to leave to file a claim under Pub. St. c. 76, § 9, providing that, if any person receiving injuries from defects in a highway is unavoidably prevented from filing a claim within the statutory time, the supreme court may allow such claim to be filed, if manifest injustice would otherwise be done.

Exceptions from Merrimack county.

Petition by Hannah Welsh for permission to file a claim for damages against the city of Franklin. The petition was granted, subject to exception. Exception overruled.

Petition for leave to file a statement of a claim for damages caused by a defective culvert or sluiceway. Facts found by the court. On the westerly side of Prospect street, a public highway in Franklin, there is a sidewalk, a part of which, about 150 long and 6 feet wide, is made of plank. Underneath

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421.

the plank portion there is an open ditch, having a concreted surface, into which surface water from the street is conducted near the upper end, and from which it flows through pipes into a sewer located under the center line of the street, or flows out at the lower end of the plank walk through a continuation of the ditch. The easterly end of the plank walk is about 6 inches above the surface of the street, the intervening space being open. The street at this place is narrow, and one reason for raising the plank walk above the level of the street was to protect the persons using it from injury from passing teams. Another reason was to provide a sidewalk above the ditch. The plank walk and ditch, together or separately, are not a "culvert" or "sluiceway," within the meaning of those words as used in section 1, c. 59, Laws 1893; but the plank walk is a "bridge," within the meaning of that term in the statute. The plaintiff has leave to amend her petition so as to cover this finding. February 9, 1899, the plaintiff, while walking on the plank walk, fell and was injured in consequence of an alleged defect in it. The evidence was conflicting as to the cause of her fall, her evidence tending to show that it was a hole in the walk; the defendants, that it was the slippery condition of the walk, caused by snow and ice. The plaintiff, being unavoidably prevented from seasonably filing a statement of her claim as required by section 7, c. 76, of the Public Statutes, was given leave to file one, subject to exception.

Willis G. Buxton and David F. Dudley, for plaintiff.
Leach, Stevens & Couch, for defendant.

WALLACE, J. Whether the point at which the plaintiff was injured was a bridge, a culvert, or a raised sidewalk, merely, need not be definitely determined at the present time. "It was not the design of the statutes to subject the parties to the expense of two trials. * * * If it appears that important questions of fact or law are involved, which the petitioner intended and was reasonably entitled to litigate, and that he has been prevented through accident, mistake, or misfortune, and not from his own fault, the petition is granted," if a further hearing would be equitable. Gitchell v. Andover, 59 N. H. 363, 364; Chadbourne v. Town of Exeter, 67 N. H. 190, 29 Atl. 408. It has been found as a fact that the plaintiff ought to be permitted to litigate the question in controversy between herself and the defendants. Page v. Campton, 63 N. H. 197. The controversy between the parties may be whether the place of injury was a culvert or bridge, within the meaning of the statute. This is an important question, which the court at the trial term found the plaintiff should be permitted to litigate. In the trial of her suit, neither party will be concluded by the finding that the place was a bridge, and not a culvert, or merely a sidewalk. It cannot be said that on a full investigation the evidence will not show the spot either a bridge or a culvert, although it may appear it is

neither one nor the other. The question whether the city is liable if the accident happened from ice and snow on the surface of the planking does not arise at this time, because there was evidence tending to show that the accident was caused by a hole in the planking. Exception overruled.

CHASE, J., did not sit. The others concurred.

BRASH *v.* CITY OF ST. LOUIS.

(*Supreme Court of Missouri, March 26, 1901.*)

[61 S. W. Rep. 808.]

Defective Sewer*—Extraordinary Storm*—Instructions.*—Where a city set up the defense that the breaking of a sewer was caused by the act of God manifested in an unusual rainfall, and there was evidence that the sewer was defective by reason of improper construction and failure to repair, and that the rainfall was of an unusual character, it was proper to charge that if an unusual rainfall would have caused the breaking of the sewer, notwithstanding its defects, then the city was not chargeable with negligence; but if the breaking was caused by such defects, or if it was caused by such defects commingled and concurring with unusual rainfall, then the city was liable.

Same—Instructions.—When a requested charge is fully covered by the charge given, its refusal affords no ground for reversal.

In banc. Appeal from St. Louis circuit court; Leroy B. Valliant, Judge.

Action by Minnie Brash against the city of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

B. Schnurmacher and Chas. C. Allen, for appellant.
Clinton Rowell and J. H. Zumbalen, for respondent.

BRACE, J. This is an appeal from a judgment of the St. Louis city circuit court in favor of the plaintiff for the sum of $650, for damages to her premises and personal property caused by the bursting of Rocky Branch sewer, and the overflow of water therefrom, on the 27th of May, 1896. The errors assigned for reversal are the giving of instructions numbered 1, 2, and 3 for the plaintiff, and the refusal to give defendant's instructions numbered 6 and 7. The defense was that the bursting of the sewer was caused by the act of God, manifested in an "unusual and unexpected rainfall and flow of water." The evidence tended to prove that the front of plaintiff's premises is level with Palm street; that her lot slopes to the rear, where it is three or four feet below the grade of Palm street; that the sewer back of her premises, and for some distance eastward, was built upon still lower ground, on a 20-foot right of way. The sewer at this point, for a distance of 150 feet, was built almost wholly above the surface of the ground; 3 feet of the side walls, and the entire brick arch, which is

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421.

5 feet high, being visible and exposed. This sewer was built through this block in 1872 or 1873, and at that time about 1 foot of earth was put on top of it. In the course of a few years this ballasting was washed away, and it was not replaced until after the accident; and for years prior to the accident about 150 feet in length of the sewer was exposed to view and to the elements, as above stated. For several years prior to the accident, a crack about one-half inch wide and 20 feet in length existed in the arch of the sewer where it was thus exposed, and a little west of plaintiff's premises. This crack extended through the arch, so that the water running in the sewer could be seen and heard through it. The evidence further tended to show that the Rocky Branch sewer was built along the course of a natural channel of drainage, Rocky Branch creek; that the ground in said block upon which it was built was low and marshy; that, when the sewer was built, old fence planks were laid under the timbers upon which the walls rest; that at the time of the accident the walls had sunk and settled, and that one row of bricks had fallen out of the center of the underside of the arch at or near the place where it broke; that the sewer broke at the point where it was uncovered and exposed, and just where the crack in the arch was shown to have been; the whole arch, for a distance of 70 to 100 feet, caved in or was broken up; that sewers are built of a capacity to carry off an inch of water per hour, delivered to the sewer, for each acre of territory drained; that, if there is a rainfall of one inch an hour, not all this would find its way to the sewer, and a smaller part thereof would be delivered to the sewer in a sparsely-settled section, where many streets are unpaved, such as this was, than in a closely built up district; just west of the place where the sewer broke there was 15 feet of earth on top of it, and, if the sewer had been covered to grade at the point where it broke, there would have been 12 to 15 feet of earth on the arch; that sewers were designed to be covered with earth, which serves to strengthen them; and that in the city of St. Louis sewers are not built nearer the surface of the ground than 11 feet, and if there had been 10 feet of earth upon the sewer at this point it would, probably, not have burst. The evidence further tended to prove that the sewer burst between 5 and 6 o'clock p. m. of the 27th of May, 1896, during the prevalence of the cyclone of that date in South St. Louis; that in said city, at the custom house, Eighth and Olive streets, some two miles nearer the path of the cyclone than the place in question, the rainfall from 5 to 6 o'clock p. m. was 1.32 inches. Dr. Frankenfield, the official of the weather bureau, testified that: "We do not often have a rainfall of 1.32 inches an hour. We do have such an amount of rainfall, it is not often, but it does occur. * * * I would call it unusual to have more than an inch of rain fall in an hour. It is unusual, but not unprecedented. I have no idea how often that has occurred. I could come

within reasonable limits, I suppose, but I do not know exactly. My best impression is that is about once a year, I should say." The evidence further tended to prove that the rainfall in the Rocky Branch sewer district was not as great as in some other portions of the city.

The general doctrine of the question in issue on the instructions is thus stated in 1 Shear. & R. Neg. (5th Ed.) § 39: "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other force for which he is not responsible, including 'the act of God,' or superhuman force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the superior force, which, concurring with his own negligence, produced the damage. But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." And this is the prevailing doctrine in this state. Wolf v. Express Co., 43 Mo. 421; Read v. Railroad Co., 60 Mo. 199; Pruitt v. Railroad Co., 62 Mo. 527; Davis v. Railway Co., 89 Mo. 340, 1 S. W. 320; Haney v. City of Kansas, 94 Mo. 334, 7 S. W. 417; Association v. Talbot, 141 Mo. 674, 42 S. W. 679. There is nothing in the rulings in Flori v. City of St. Louis, 69 Mo. 341, or Turner v. Haar, 114 Mo. 334, 41 S. W. 737, inconsistent with this doctrine.

The plaintiff's instructions complained of are as follows: "(1) The court instructs the jury that it is the duty of the city to construct and maintain its sewers in such a manner as to make them safe against danger of breaking from any rainfall which is reasonably to be expected, and while the city is not bound to construct its sewers so that they will withstand extraordinary rainfalls or any act of God, yet it is the duty of the city to guard, as far as reasonable foresight and prudence can, against danger from extraordinary rainfalls by constructing and maintaining its sewers in accordance with the ordinary and usual methods adopted for the proper and safe construction and maintenance of sewers. Therefore, even if you find from the evidence that the break in the sewer shown in evidence resulted from an extraordinary rainfall, yet if you further find that the city failed to properly construct the sewer, or failed to keep it in proper repair, or failed to cover the sewer with earth, and that the failure of the city to so construct, repair, or cover the sewer with earth contributed to the breaking of the sewer,—that is to say, if you find that, nothwithstanding the unusual rainfall, the break would not

have occurred if the city had performed its full duty in the construction, repair, and covering of the sewer,—then your verdict will be for the plaintiff, if you find that she was damaged by the breaking of the sewer. (2) The court instructs the jury that if they believe from the evidence that the top arch of the sewer had sprung a crack at the point where it burst, and that the defendant had knowledge of said condition, or by the exercise of reasonable care and prudence could have discovered said condition, in time to have repaired said defects before the break occurred, and if you further find from the evidence that the break in said sewer was occasioned by said defects, then your verdict must be for the plaintiff, if you find that she was damaged by the breaking of the sewer, even though you may further find that the break occurred during a rainstorm of unusual severity. (3) The court instructs the jury that if they believe from the evidence that the top arch of the sewer was entirely exposed and unprotected by any ballasting at the point where it burst, and that it had been allowed to remain in said condition for years by the defendant, and that the sewer burst in consequence of the top arch thereof being exposed and unballasted, and that plaintiff was damaged by the bursting of the sewer, then your verdict must be for the plaintiff."

The defendant's instructions, the refusal of which is complained of, are as follows: "(6) The jury are instructed that, if they believe from the evidence that the bursting of the sewer in the rear of the premises of plaintiff was caused by a storm of unusual force and violence, they will find a verdict in favor of the defendant. (7) The term 'negligence,' as used in these instructions, means the want of ordinary care, and the term 'ordinary care' means such care as a person of ordinary prudence would have exercised under the same or similar circumstances."

It may be conceded that there was evidence upon which the jury might have found that the rainfall in this sewer district in the hour between 5 and 6 o'clock p. m. of the 27th of May, 1896, was of such an unusual character as could not have been reasonably anticipated and provided against, and, applying the doctrine stated to the case, if such unusual rainfall would have burst the sewer anyhow, notwithstanding its defects, then the defendant is not liable, and so the jury were in effect told by instruction No. 2, given for the defendant. On the other hand, if the bursting of the sewer was caused by the defects mentioned in plaintiff's instructions numbered 2 and 3, it could not have been caused solely by the unusual rainfall, and the defendant is liable, as the jury were told in those instructions; or if the bursting of the sewer was caused by those defects, commingled and concurring with the unusual rainfall and flow of water, still the defendant is liable, as they were told in plaintiff's instruction numbered 1. Taking these instructions together, we think the case was fairly presented to

the jury. Although the unusual rainfall may have been one of the causes of the bursting of the sewer, yet if the defects in the sewer were also concurring causes, producing that effect, the defendant is nevertheless liable; hence the court committed no error in refusing defendant's instruction No. 6. Defendant's instruction No. 7, defining "negligence," was fully covered by its instruction No. 2, and its refusal affords no sufficient ground for reversal. The judgment is for the right party, ought to be affirmed; and it is so ordered. All concur, except MARSHALL and VALLIANT, JJ., not sitting.

CITY OF LASALLE *v.* KOSTKA.

(*Supreme Court of Illinois, April 18, 1901.*)

[60 N. E. Rep. 72.]

Appeal—Finding of Damages by Appellate Court Made Conclusive on Supreme Court by Statute.—Under the statute making the finding of facts by the appellate court conclusive on the supreme court, the amount of damages sustained by plaintiff in an action at law is a question of fact, on which the decision of the appellate court is final.

Injuries to Servant—Notice of Defect—Instructions.—A charge in an action for injury to a servant that, "if the jury believe plaintiff has made out his case, as laid in the declaration, by the preponderance of the evidence, they must find for plaintiff," etc., is not faulty as ignoring the questions whether plaintiff knew of the defect, or could have known by the exercise of ordinary care, or had as good opportunity as defendant of knowing it; the declaration alleging that plaintiff was "using due and ordinary care for his own safety," which negatived his knowledge of the defects, and the fact of knowledge being matter of defense.

Caving of Sewer Excavation*—Assumption of Risk.—The danger to a workman from caving in of the sides of a sewer excavation cannot be said, as matter of law, to be an assumed risk.

Same—Instructions—Harmless Error.—Refusal of a charge is harmless where substantially the same charge is contained in other instructions.

Same—Evidence.—A declaration alleged that defendant failed to keep "the earth, sand, and other substances" of the walls of a sewer excavation firmly in place "by negligently suffering the excavation to remain in an unsafe condition," by suffering the earth, sand, etc., to remain in a "loose, water-soaked, and dangerous condition." *Held* sufficient to authorize evidence that the sides of the sewer were not properly or securely braced or shored.

Same—Plaintiff's Knowledge of Defective Condition a Question for the Jury.—A charge in a personal injury case that, if plaintiff himself dug the ditch at the spot where he was injured, he had such notice of its condition as would bar him from recovering for injury received therefrom, is erroneous, the question of such knowledge being for the jury.

Instructions—Harmless Error.—Striking out from a requested charge on credibility of witnesses the words "from the appearance of the witnesses on the stand," is harmless error, the charge, as left, stating that the jury "have the right to determine * * * from their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit," etc.

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*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *note*, 1 Mun. Corp. Cas. 77.

City of Lasalle *v.* Kostka

Caving of Sewer Excavation—Fellow Servants—Instructions.—A sewer was dug under the supervision of the city street supervisor, assisted by the city engineer, who acted as foreman under him. The proof tended to show that the braces to prevent the sides of the sewer, which had been loosened by a rain, from falling in, were put in under the direct supervision and orders of the foreman. *Held*, that a charge on fellow servants was correctly refused in an action for injuries caused by the caving in of the sewer.

Appeal from appellate court, Second district.

Action by Hyacinth Kostka against the city of Lasalle. From a judgment of the appellate court (92 Ill. App. 91) affirming a judgment for complainant, defendant appeals. Affirmed.

This is an action on the case, brought by appellee against appellant to recover damages for injuries sustained by him in consequence of the caving in of the banks of a sewer in which he was working for appellant under the direction of its street superintendent. The sewer caved in, and seriously injured appellee. Two years later he brought this suit. The defendant filed a plea of not guilty, and upon trial by jury there was a verdict of $2,500 in favor of appellee, upon which the court rendered judgment. An appeal was taken from this judgment to the appellate court, where the judgment of the circuit court was affirmed. The present appeal is prosecuted from such judgment of affirmance. The declaration contained one count only, which charges that the defendant, the city of Lasalle, was, on or about July 7, 1897, engaged in the construction and excavation of a certain sewer within said city in an alley between Bucklin and Wright streets in said city; that the complainant was employed by the city as a common laborer to assist in constructing and excavating said sewer; that "it was the duty of defendant to so construct said sewer that the sides or walls of the excavation would be firm, and that the earth, sand, and other substances then and there being would be firmly held in place, and that persons in the employ of said city, and engaged in the constructing of said sewer, might with safety enter into the excavation thereof to perform the work necessary to be performed therein, to properly construct the same; yet the defendant, not regarding its duty in that behalf, while it was so constructing said sewer aforesaid, to wit, on the day aforesaid, there wrongfully, carelessly, and negligently suffered the excavation for the sewer to remain in an unsafe condition, and the earth, sand, and other substances forming the sides or walls of said excavation to remain in a loose, water-soaked, and dangerous condition; whereby the plaintiff," etc.

William J. Siegler, City Atty., and Haskins & Panneck, for appellant.

George J. Gleim, John E. Coleman, and Trainor & Browne, for appellee.

City of Lasalle *v.* Kostka

MAGRUDER, J. (after stating the facts). The appellant announces in its brief that it relies for a reversal of the judgment in this case upon the following propositions: "First, that the court erred in giving the two instructions asked by appellee; second, that the court erred in refusing several of the instructions asked by appellant; third, that the court erred in permitting the appellee to make proof of the fact that the ditch in question was not shored or braced at the place of the accident at the time of the injury; fourth, because the damages awarded the appellee were excessive."

As to the fourth proposition,—that the damages awarded the appellee were excessive,—it is sufficient to say that the amount of damages sustained by the plaintiff in an action at law is a question of fact, which is not open for consideration in this court under the statute. Railroad Co. v. Bode, 150 Ill. 396, 37 N. E. 879, and cases there cited; Railway Co. v. Walsh, 157 Ill. 672, 41 N. E. 900.

The proposition that the trial court erred in permitting appellee to prove the fact that the ditch in question was not shored or braced at the place of the accident when the injury occurred is disposed of by what is hereafter said in reference to the refusal of the court below to give for the appellant its instruction numbered 28.

1. It is assigned as error by the appellant that the court gave the two instructions which it gave for the appellee numbered 1 and 2. The first of the two instructions given for the appellee is as follows: "If the jury believe from the evidence that the plaintiff has made out his case, as laid in the declaration, by a preponderance or greater weight of the evidence, they must find for the plaintiff," etc. This instruction, in substantially the same form, was approved by this court in Pennsylvania Co. v. Marshall, 119 Ill. 399, 10 N. E. 220. But appellant contends that the instruction is erroneous because it ignores the questions whether or not—First, the appellee knew the condition of the ditch; or, second, could have known of its condition by the exercise of ordinary care; or, third, had as good an opportunity of knowing its condition as the defendant had. Appellant contends that under the first instruction the jury might have believed all the elements contained in the declaration to have been proved as laid, and still, as a matter of law, appellee would not be entitled to recover upon the theory that the declaration failed to allege that appellee did not know of the dangerous condition of the ditch, or by the exercise of ordinary care could not have known of it, or did not have as good an opportunity to know as the defendant had. The declaration alleges, in addition to the allegations thereof in the statement preceding this opinion, that the plaintiff was "using due and ordinary care for his own safety." "The allegation of due care in the " injured party "negatives negligence, and, by implication, that he had knowledge of the defects by reason of which he was injured.

* * * The allegation is therefore sufficient on error, if, indeed, it should be admitted that it would not be so on demurrer." Railroad Co. v. Hines, 132 Ill. 161, 23 N. E. 1021; Railroad Co. v. Simmons, 38 Ill. 242. The allegation of due care in plaintiff's declaration negatived his knowledge of the defects by which he was injured, and the declaration stands as if it contains the express allegation that plaintiff had no such knowledge. If plaintiff had knowledge of the defects through which his injury was received, the fact of such knowledge is matter of defense. In Railroad Co. v. Hines, supra, we said: "But it is a matter of defense that the deceased had knowledge of the defects through which his injury was received. Unless it shall appear from the evidence that he had such knowledge, it will not be presumed, since no one is presumed to knowingly incur physical pain and death where he can avoid it at his discretion." Railway Co. v. Cross, 73 Ill. 394; Railway Co. v. Shacklet, 105 Ill. 364. Hence we are of the opinion that the court committed no error in giving the first instruction which was given for the appellee. The same reasoning applies to the second instruction given for the appellee, inasmuch as the same defect is urged against the latter which is urged against the former. It may be observed in this connection, however, that the court did give to the jury in behalf of appellant instructions which required them to find, as one of the conditions to appellee's right of recovery, that he did not know, or could not have known by the exercise of ordinary care, that the ditch or sewer in which he was working was unsafe, and that his means of knowledge were not equally as good as those of the city. Nor can it be said as a matter of law that appellee assumed the risk of the dangers to which he was exposed. "The rule that the servant assumes the ordinary risks incident to the business presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him. It is these risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes." Pantzar v. Mining Co., 99 N. Y. 376, 2 N. E. 24; Booth v. Railroad Co., 73 N. Y. 40; Coal Co. v. Reid, 3 Macq. 275. The law is that the servant does not assume risks that are unreasonable or extraordinary, nor risks that are extrinsic to the employment, nor risks of the master's own negligence. In Noyes v. Smith, 28 Vt. 64, the supreme court of Vermont say: "The master is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks or dangers, and the servant has a right to understand that the master will exercise that diligence in protecting him from injury. * * * It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master that can properly be termed 'accidents' or 'casualties' which the servant has

impliedly agreed to risk, and for which the master is not liable."

2. It is claimed on the part of the appellant that the court erred in refusing to give certain instructions asked by the appellant, and, among these, instructions numbered 26 and 37. Instructions 26 and 37 told the jury that if they believed from the evidence that the plaintiff had as good an opportunity to ascertain for himself as the defendant had for itself whether the sewer in which he was working was or was not dangerous at the time of the injury, then, and in such case, if they believed from the evidence that plaintiff voluntarily continued to work therein, and while working therein was injured by reason of a portion of the bank of said ditch falling upon him, he was, in such case, not entitled to recover. Whether or not these instructions embodied a correct principle of law it is not necessary to decide, as their refusal worked no injury to the appellant, for the reason that the doctrine announced therein was embodied in instruction No. 19 which was asked by the appellant, and which was given by the court for the appellant. Instruction No. 19 given for the appellant stated to the jury as follows: "And if you believe from the evidence that the plaintiff did know, or by the exercise of ordinary care on his part might have known, of the condition of the bank or sides of said ditch; or if you further believe from the evidence that he had as good an opportnuity of knowing of the condition of the bank or sides of said ditch as the defendant,—then, in law, he is estopped from recovering in this action, and it is your duty to find for the defendant." Complaint is made that the trial court refused instruction numbered 28 asked by the appellant. This instruction told the jury that, although they might believe from the evidence that the plaintiff had no knowledge of the condition of the sewer, and that the ditch or sewer might have been more safe if it had been braced or shored, still the question whether said ditch was or was not properly or securely braced is not a question to be passed upon by the jury, as there is no allegation charging that the plaintiff was injured by reason of the insufficient bracing or nonbracing or the not properly bracing said ditch. This instruction, numbered 28, told the jury that the only question for them to determine was whether the plaintiff was injured by reason of the side or sides of the ditch being in a loose or water-soaked condition. We think that the allegations of the declaration are broad enough to have justified the court in admitting the proof which was admitted, tending to show that the sides of the ditch or sewer were not properly or securely braced or shored. The contention of the appellant seems to be that the allegations of the declaration are merely to the effect that the side or sides of the ditch were in a loose or water-soaked condition, and not in a dangerous condition. It is claimed that under the declaration the appellee could only show such an

unsafe and dangerous condition of the ditch as was due to the fact that the sides thereof were permitted to remain in a loose and water-soaked condition. We are unable to agree with counsel for appellant in this contention. The declaration alleges that the appellant disregarded its duty by failing to keep "the earth, sand, and other substances" of the walls or sides of the sewer "firmly in place," by "wrongfully, carelessly, and negligently suffering the excavation for the sewer to remain in an unsafe condition," by suffering "the earth, sand, and other substances forming the sides or walls of said excavation to remain in a loose, water-soaked, and dangerous condition." The conjunction "and" is a co-ordinate conjunction. It is not explanatory, but signifies and expresses the relation of addition. As used in the declaration as above quoted, it means that the earth, sand, and other substances of the walls or sides of the ditch were in a condition beyond, or in addition to, that of "a loose and water-soaked" condition; and that they were also in a dangerous condition. Under the allegation that the sides of the ditch were in a dangerous condition it was proper to show by testimony that they were in such dangerous condition by reason of the absence of proper braces. We are of the opinion that no error was committed by the court below in refusing to give said instruction numbered 28.

It is assigned as error that the trial court refused to give appellant's instruction numbered 31, which said to the jury: "If you believe from the evidence that the plaintiff himself dug the ditch at the particular spot where he was injured, then, and in such case, the law is that he had such notice of the condition of the said ditch as would bar him from recovering," etc. This instruction tells the jury that, as a matter of law, the fact that the plaintiff was himself engaged in digging the ditch was conclusive upon the question as to his knowledge of its defective condition. The fact that he was so engaged may have been a strong circumstance from which the jury would be allowed to infer that he had such knowledge, but it was a question for them to determine from that fact and from all the other evidence in the case, whether or not he did have such knowledge. While instructions similar to instruction numbered 31 have been indorsed by the courts in some of the states, such instructions have not received the approval of this court. For example, in Pennsylvania Co. v. Frana, 112 Ill. 398, it was held that the trial court properly refused an instruction which told the jury that, if the plaintiff there could have discovered the approach of the defendant's train and avoided the injury by stopping his horse before driving upon the track and looking and listening for the approach of the train, he could not recover; and it was there said that, although it was the duty of a person about to cross a railroad track to approach cautiously, and endeavor to ascertain if there was present danger in crossing, yet it was a question of

fact for the jury to determine from the evidence whether the person injured had exercised proper care and caution in crossing the track, and not a question of law. The case of Pennsylvania Co. v. Frana has been approved in the following cases: Myers v. Railway Co., 113 Ill. 386, 1 N. E. 899; Railroad Co. v. Haskins, 115 Ill. 300, 2 N. E. 654; Railroad Co. v. Adler, 129 Ill. 335, 21 N. E. 846; Railroad Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Railroad Co. v. Lane, 130 Ill. 116, 22 N. E. 513; Pennsylvania Co. v. Backes, 133 Ill. 255, 24 N. E. 563; Railway Co. v. Hansen, 166 Ill. 623, 46 N. E. 1071; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713.

Appellant asked the court to give instruction numbered 12, which told the jury that the credibility of a witness is a question exclusively for them, and that the law is that, where a number of witnesses testify directly opposite to each other, the jury is not bound to regard the weight of the evidence as evenly balanced; that they "have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give the credit accordingly." The court modified this instruction by striking out the words, "from the appearance of the witnesses on the stand," and gave it as thus modified. Counsel for the appellant contends that the court erred in thus modifying the instruction, and we agree with them. In Stampofski v. Steffens, 79 Ill. 303, we said that it was for the jury to determine the credibility of the witnesses "from the appearan e of the two witnesses upon the stand, their manner of testifying," etc. The court might well have given the instruction with the omitted words in it. But the modification of the instruction, although technically erroneous, could have done the appellant no injury in this case because the elements presented to the jury by the instruction as means of determining the credibility of the witnesses were involved in their appearance upon the stand. The jury must necessarily have observed the appearance of the witnesses on the stand in order to determine their manner of testifying, their apparent candor and frankness, their apparent intelligence or lack of intelligence. Therefore the clause omitted from the instruction was substantially embraced in, and was necessarily a part of, the portions of the instruction which were given.

It is further charged by the appellant that the court below committed error in refusing to give instruction numbered 36 asked by the appellant. That instruction told the jury that if they believed from the evidence that the injuries inflicted upon the appellee were caused by the negligence of his co-employees who were engaged in attempting to put a brace in said ditch, then, and in such case, the defendant was not liable

for such injuries, provided the jury further believed from the evidence that such persons who were engaged in putting in said braces were fellow servants of the plaintiff. This instruction was properly refused, for the reason that there was no evidence upon which to base it. The sewer or ditch was dug under the direction and supervision of the city street supervisor, named Burkhart, assisted by the assistant city engineer, named McGovern, who acted as a foreman under Burkhart. The proof tends to show that the braces to prevent the sides of the ditch, which had been loosened by a recent rain, from falling in, were put in under the direct personal supervision and express orders of the foreman for appellant. They were put in just as this foreman directed, and the putting of them in, being his act, was the act of the appellant itself. The foreman cannot be held to have been a fellow servant of the appellee. If there was any negligence in the putting in of the braces, it was the negligence of the foreman, and hence the negligence of appellant. The law of fellow servant has no application to such a state of facts. Where a master confers authority upon one of his employees to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master, and not a mere fellow servant; and all commands given by him within the scope of his authority are in law the commands of the master. Railroad Co. v. May, 108 Ill. 288; Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946; Railroad Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590; Fraser & Chalmers v. Schroeder, 163 Ill. 459, 45 N. E. 288. The foreman of the appellant was chargeable with a specific duty, to wit, that of exercising reasonable care to see that the place where he sent appellee to work was reasonably safe, and appellee had the right to rely upon the performance of such duty by the foreman before the latter gave the order for appellee to work where he did work. Appellee was not required to make a critical and careful examination of his surroundings at the place where he was sent to work by the foreman. The foreman represented appellant, and was bound to take reasonable precaution for the safety of appellant's employees, and in ordering appellee to work where he did work was charged with the duty of seeing that the place was reasonably safe. Ross v. Shanley, 185 Ill. 390, 56 N. E. 1105.

We discover no error in this record which would justify us in reversing this judgment. Accordingly, the judgment of the appellate court is affirmed. Judgment affirmed.

CITY OF GRAND RAPIDS *v.* VAN ROSSUM *et al.*

(*Supreme Court of Michigan, April 16, 1901.*)

[85 N. W. Rep. 867.]

Sewer Excavation*—Contractual Duty to Save Harmless Cannot Be Gotten Rid of by Assignment.†—Defendant, a plumber, gave bond to the city of Grand Rapids to save it harmless from excavations made by him in the streets when making connections with gas, water mains, etc., and to fill and properly cover the excavations after his work was completed. He dug a trench across a street, and, instead of covering it when his work was completed, he made an arrangement with one Owens, who was digging a sewer lengthwise of the street, by which the latter agreed to take care of the excavation in the line of the sewer, and properly protect it. Defendant did not notify the city of this arrangement, or obtain permission to turn the excavation over to Owens. Owens failed to properly guard the opening. A person fell in, was injured, and recoverd damages against the city. In a suit upon defendant's bond, *held* that he was primarily liable, and could not defend by showing his agreement with Owens, although Owens had given an indemnity bond to the city.

Error to superior court of Grand Rapids; Richard L. Newnham, Judge.

Action by the city of Grand Rapids against Joseph Van Rossum and others. Verdict for plaintiff. Defendants bring error. Affirmed.

The defendant Joseph Van Rossum is a licensed plumber in the plaintiff city. He gave a bond conditioned to hold the city harmless from all loss or damage that should "be occasioned in any way by accident or the want of care on the part of the said Joseph Van Rossum in the prosecution of any work he may do under and by virtue of his said appointment, * * * or that may be occasioned by reason of any opening by him made or caused to be made in any street, lane," etc., "and shall promptly at the proper time replace and restore the street or pavement over such openings to as good state and condition as the same was previous to and at the time of opening the same." On the 1st day of August, 1898, he dug a trench across Ottawa street for the purpose of making a water connection. By reason of this excavation being left unprotected, one Elizabeth Monje fell into it, was injured, sued the city, and recovered damages. Monje v. City of Grand Rapids (Mich.) 81 N. W. 574. Plaintiff had completed the plumbing work, and had filled the ditch, except in the line of a sewer which was being dug lengthwise to Ottawa street by one Owens under a contract with the city. Owens had given a bond similar to that of defendant, to hold the city harmless. Owens' trench would cross the excavation made by the defendant, and he requested the defendant not to fill the ditch where he would cross. Defendant testified that he made an arrangement with Owens by which Owens assumed control of the trench, and promised to protect it;

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421.
†See *note*, 5 Mun. Corp. Cas. 374.

that before the accident happened Owens had reached the excavation made by the defendant; that Owens failed to protect the place, and that by reason of his failure Mrs. Monje was injured. The court directed a verdict for the plaintiff.

R. M. Ferguson (James J. Danhof, of counsel), for appellants.

Lant K. Salsbury, for appellee.

GRANT, J. (after stating the facts). Defendant made the excavation. Under his bond with the city it was his duty to protect it when open, and to cover it up when his work was completed. He did not do it, but turned it over to Mr. Owens, with an agreement upon his part that he would protect it. Defendant fully understood his legal duty. He might have sought the proper authorities of the city, and relieved himself from liability by agreement with it to turn the excavation over to Mr. Owens. He did not, however, even notify the city of his arrangement with Owens. He was primarily liable. The city is under no obligation to ascertain whether defendant or Mr. Owens was liable, or to run the risk of determining what the contract was between defendant and Owens, and of thus falling between two stools. Plaintiff knew that defendant made the excavation; that it had not been filled; that it was left unprotected, in consequence of which the city was subjected to damage. Its right to look exclusively to defendant, who was primarily liable, is undoubted. If defendant has any remedy, he must seek it against Owens. Judgment affirmed. The other justices concurred.

JONES *et al.* *v.* CITY OF CHANUTE *et al.*

(*Supreme Court of Kansas, June 8, 1901.*)

[65 Pac. Rep. 243.]

Open Sewer*—Private Individual Who Sustains No Special or Peculiar Injury Cannot Maintain Action to Abate a Public Nuisance.*—One complaining of the nuisance of a ditch or open sewer into which is drained refuse and filthy matter, giving off disagreeable odors and poisonous exhalations, but who sustains no damage from it peculiar or special to himself, but only such as is common in greater or less degree to the whole public, cannot maintain an action in his own name to abate the nuisance. It can be abated only by a prosecution instituted in behalf of the public by the proper officers.

Open Sewer—Public Nuisance—Meaning of the Words "The Public."—By the words "the public," used with respect to the collective body in whose behalf a prosecution to abate a common nuisance must be brought, is meant all those who are affected by the nuisance in the same way, or who, having occasion to come in contact with it, may be affected in the same way, though differing in the extent or degree to which they may be injured.

(Syllabus by the Court.)

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*See *note* to Mayor, etc., of City of Waycross *et al.* *v.* Houk, *ante*, p. 421; *notes*, 3 Mun. Corp. Cas. 455; 1 Mun. Corp. Cas. 162.

Jones *v.* City of Chanute

Error from district court, Neosho county; L. Stillwell, Judge.

Action by the city of Chanute and others against M. T. Jones and others. Demurrer as to the city of Chanute overruled, and defendants bring error. Reversed.

John J. Jones and H. P. Farrelly, for plaintiffs in error.

J. L. Denison, for defendants in error.

DOSTER, C. J. This was an action to abate a nuisance, brought in the court below by the defendants in error, as plaintiffs, against the plaintiffs in error, as defendants. A demurrer to the petition as to the city of Chanute was sustained, but overruled as to the other plaintiffs, and therefore the city is not a party to the proceeding in error to this court. The plaintiffs in error, defendants below, are the proprietors of a hotel situated in the city. The alleged nuisance consists of kitchen washings, excreta from the hotel closets, and other refuse and filthy matter drained from the hotel building into an open ditch or sewer, near which the defendants in error, plaintiffs below, reside. Upon the hearing affidavits alone were used, and a permanent injunction abating the drain from the hotel into the open sewer was awarded. The defendants below complain of the order of the court overruling their demurrer to the petition, and complain of the final order of injunction, and hence prosecute error to this court. The ground of error principally argued before us was the overruling of the demurrer. It is questionable whether the petition stated a cause of action in behalf of the plaintiffs as individual citizens, because it would appear by some of its allegations to declare against a public, as distinguished from a private, nuisance. It is not necessary, however, to determine whether the demurrer was rightly overruled. An examination of the evidence quite clearly shows that the nuisance complained of is of the character designated "public," and, being such, can be abated at the suit of the public only. The plaintiffs do not undertake to show that the injuries they received from the nuisance are in any wise different in character from those sustained by others of the general public of the city. The affidavits of a large number of persons, other than the plaintiffs, living in proximity to the open ditch or sewer, show that they, as well as the plaintiffs, were affected by the odors from the ditch, and are equally liable to be affected by the poisonous exhalations from it. Others living more remote from the ditch, whose business requires them to cross over or pass near it, or remain for a time in proximity to it, made affidavit to its disgusting, disagreeable, and dangerous character. These two last-mentioned classes of persons may not be affected by the nuisance to the same degree as the plaintiffs, but it is clear from the testimony that they are or may be affected by it in the same way as the plaintiffs. The

law is quite well settled. "An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be required." Civ. Code, § 253 (Gen. St. 1889). In an action by a private individual to abate a public nuisance, it must be shown that the plaintiff has sustained damages peculiar to himself. It is not enough that such damages are greater than those sustained by the public at large, differing from them only in degree. They must be different in kind. School Dist. v. Neil, 36 Kan. 617, 14 Pac. 253, 59 Am. Rep. 575. The general rulings of the court are that, before a private citizen can be allowed to maintain an action for the redress of a public wrong, he must allege and show some interest personal and peculiar to himself, that is not shared by, or does not affect, the general public; and it is not enough that his damages are greater than those sustained by the general public, differing from them only in degree. Board v. Smith, 48 Kan. 331, 29 Pac. 565; 2 Wood, Nuis. (3d Ed.) § 732. It is often difficult to tell whether a nuisance is so general in its character—that is, affects a sufficient number of persons—to justify its characterization as a "public nuisance." In such cases, how many persons shall be called "the public"? Of course, in one sense, the public is everybody; but, manifestly, that is not the sense in which the word is used in the law relating to nuisances. In that law by the words "the public" is meant those who reside in definite municipal boundaries, entitled to the protection of the local laws, and to be represented by the local officers, and yet cases of nuisance affecting all the people of the local municipality will rarely occur. The words "the public" must, therefore, have even a narrower signification, and be inclusive of even a less number. We think that the definition of the words with relation to the subject in hand is quite clearly indicated, if not stated, in a note to Wood on Nuisances, supra, wherein it is said: "It has now come to be understood that a public nuisance does not necessarily consist in any act or thing which does in fact annoy all the public, but to that which may annoy all who come in contact with it." In the sense thus indicated, it is quite clear that the nuisance in question, under the evidence before us, is public in its nature. It must therefore be abated by a public prosecution. The judgment of the court below is reversed for proceedings in accordance with this opinion. All the justices concurring.

BIGGIO *et al.* *v.* CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts, Suffolk, June 18, 1901.*)

[60 N. E. Rep. 938.]

Flooding of Cellar*—Proximate Cause—Directing Verdict.—Where, in an action for damages caused by water flooding plaintiff's cellar through alleged negligence of defendant in stopping the flow from an adjacent lake, the report does not show that the fact that plaintiff's cellar was below the established grade, as provided by statute, contributed to the injury, and there was evidence to the contrary, it was error to direct a verdict for defendant, since plaintiff's violation of the law would not prevent a recovery if it did not contribute to the injury.

Report from superior court, Suffolk county; Francis A. Gaskill, Judge.

Action by James T. Biggio and others against the city of Boston for damages caused by flooding of plaintiffs' cellar. On judgment being rendered in favor of defendant, motion for new trial, ordered to be heard before the supreme judicial court. New trial granted.

Geo. H. Russ, for plaintiffs.
Arthur L. Spring, for defendant.

MORTON, J. The defendant contends that the water flooded the plaintiffs' cellar because the cellar was below the established grade, and that the plaintiffs cannot recover, because their violation of the statute has contributed directly to the injury which they have sustained. If the report means that the water flowed into the plaintiffs' cellar by percolation through the intervening soil, then, notwithstanding the fact that the water had not flowed into the cellar previously, and would not have flowed into it at the times complained of, but for the stopping of the outlet from the lake by the defendant, we do not see how it can be said that the plaintiffs' act in building the cellar below the established grade did not contribute to the injury which they have sustained. But we doubt whether the report should be so construed. There is a statement in the report that "the water in Orient Lake overflowed its banks, crossed Chelsea avenue, and flooded the plaintiffs' premises by entering their cellar." Again in answer to a question by his counsel, "Describe the situation," the plaintiff testified: "The situation; you mean if the flow overrun? Well, if the water raised right over the land, you mean, and over the street? * * * Well, it would come right into my cellar." What we have quoted tends to show that the water flowed over the street into the plaintiffs' cellar. The plaintiff's testimony that "he had lived in the vicinity for twenty years, * * * and that previously to February 22, 1899 (one of the occasions complained of), it had not overflowed

*See *note* to Mayor, etc., of City of Waycross *et al.* *v.* Houk, *ante*, p. 421; *note*, 1 Mun. Corp. Cas. 162; 3 Mun. Corp. Cas. 313; 3 Mun. Corp. Cas. 455.

its banks to his knowledge, nor had he ever been troubled by water flowing on his land," also tends in the same direction. There was no evidence, so far as appears from the report, how high the water rose at the times complained of, or how high above mean low-water mark Chelsea avenue was, but presumably it was higher than the grade fixed for cellar or basement floors. If the water in the lake overflowed Chelsea avenue, and flowed into the plaintiffs' cellar in that way, it is difficult to see how the fact that the bottom of the cellar was below the established grade contributed to the injury. It, at least, would be a question for the jury whether it did or not. The mere fact that the plaintiffs may have built their cellar below the established grade would not prevent them in such a case from recovering, if their violation of the law did not contribute to the injury which they have sustained. Newcomb v. Protection Dept., 146 Mass. 596, 16 N. E. 555. The operation of natural laws is such that, if the water got into the plaintiffs' cellar by percolation, the putting of the bottom of the cellar below the established grade must have contributed to the injury complained of, and therefore, as matter of law, the plaintiffs would not be entitled to recover, notwithstanding the presence of the percolating water may have been due to negligence on the part of the defendant in stopping the outlet of Orient Lake. But if, as already observed, the water crossed Chelsea avenue, and flooded the plaintiffs' premises by entering their cellar in that way, it cannot be said, as matter of law, that the plaintiffs' act in putting the bottom of their cellar below the established grade contributed to the injury. New trial granted.

HOLMES *v.* CITY OF ATLANTA.

(*Supreme Court of Georgia, July 20, 1901.*)

[39 S. E. Rep. 458.]

Grading Streets—Establishing Sewer System*—Statute Does Not Authorize Nuisance*—Statute of Limitations.—A general grant of power to grade streets, and to establish in connection therewith a system of drainage, does not carry with it any right on the part of a municipality to create and maintain a nuisance by causing surface water polluted by filth and laden with noxious odors to be discharged upon the premises of a private citizen; and he may, when such a thing has been done, maintain against the city an action to recover the damages he has in consequence sustained. (a) The present action was not barred by the statute of limitations.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by N. Holmes, executor, against the city of Atlanta. Action dismissed, and plaintiff brings error. Reversed.

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*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *notes*, 1 Mun. Corp. Cas. 162; 3 Mun. Corp. Cas. 455.

Holmes *v.* City of Atlanta

The following is the official report:

This was a suit against the city of Atlanta for damages alleged to have been sustained by reason of the flooding of the plaintiff's land in that city with surface water from rains, etc., within four years next before the filing of the suit, in consequence of the manner in which the defendant had, more than four years before suit, graded the surrounding streets and constructed the drainage in that locality. The petition alleged that within the four years the water thus cast upon the land filled and destroyed various wells dug in it during that period; that it made a large ditch across the land, periodically washed away the plaintiff's fence, periodically destroyed his garden, and deposited on the land trash, stale vegetables, and other refuse matter, and that the flooding of the land and the depositing of the refuse matter have periodically created noisome smells, which are offensive; that he has houses on the land; and that by reason of the flooding the rental value of the property has decreased. The court sustained a motion to dismiss the action on the ground that it was barred by the statute of limitations, because not brought within four years after the doing of the work from which the damage was alleged to have resulted. To this the plaintiff excepted.

W. H. Terrell, for plaintiff in error.

J. A. Anderson, J. T. Pendleton, J. L. Mayson, and W. P. Hill, for defendant in error.

LUMPKIN, P. J. As will be seen from the statement of facts set forth in the foregoing official report of this case, the plaintiff predicated his right to recover upon the theory that the city was maintaining a nuisance, in that the surface water discharged upon his premises was contaminated by filth, and as a consequence refuse matter was deposited upon his lot, which created noisome smells, caused the water in his wells to become unfit for use, and in other respects rendered his property undesirable for residence purposes, and decreased its rental value. Treating these allegations as true, the case falls squarely within the doctrine announced in Smith v. City of Atlanta, 75 Ga. 110, wherein it was held: "Although a municipal corporation had the right, under its charter, to establish a system of grading and drainage, yet this should have been done so that it would not prove a nuisance to the citizens; and if a culvert were dug across a street, whereby the surface water from the lands of adjacent proprietors was gathered, charged with the filth of sinks, and thrown upon the land of another, producing noxious scents and sickness, and rendering the enjoyment of her property impossible, the city would be liable for damages." Legislative authority to make public improvement does not carry with it the right to conduct the work incident thereto in a careless, negligent, or unskillful manner. City of Atlanta v. Word, 78 Ga. 276. It was accordingly ruled in Warnock's Case, 91 Ga. 210, 18 S.

E. 135, that: "The municipal government of Atlanta, though invested by statute with plenary powers over the subjects of streets, sewers, drainage, water supply, and sanitation, has no right to create and permanently maintain a nuisance dangerous to health and life, which nuisance consists of openings called 'manholes' in a sewer located in a public street contiguous to the dwelling of a citizen, the manholes being allowed to emit poisonous gases in large quantities through perforated covers placed over them." Where a nuisance is not of a permanent and continuing character, but such as a city may at will abate, a citizen has no right to assume that the same will be maintained indefinitely. His remedy, therefore, is not to recover in one action all past and future damages, but to bring from time to time separate suits for recurring injuries sustained, instituting each within the period prescribed by the statute of limitation for taking steps to recover damages actually suffered up to the time the action is filed. City Council v. Lombard, 101 Ga. 724, 28 S. E. 994. The present case is distinguishable from that of Atkinson v. City of Atlanta, 81 Ga. 625, 7 S. E. 692. There it appeared that the plaintiff brought against the city an action for damages which she alleged she had sustained "from the grading of certain streets and the construction of certain sewers by the city, by reason of which a large body of water was emptied upon her lots, and her property thereby injured." There was no suggestion on her part that the public improvements made were unauthorized; that there was no necessity, in carrying them into effect, to impose upon her land the servitude complained of; or that the work was unskillfully and negligently done. It did not, therefore, appear that the city had ventured beyond its corporate powers in thus throwing uncontaminated water upon her premises; and, while she undoubtedly became entitled to compensation for the damages incurred in subjecting her property permanently to an authorized public use, she allowed her cause of action to become barred by the lapse of time. She could not, of course, by arbitrarily characterizing as a nuisance a lawfully inaugurated flow of pure water over her land, take her case out of the operation of the statute of limitations. See, in this connection, the remarks of Blandford, J., who, in pronouncing the opinion of the court in that case, took occasion to differentiate it from that of Smith v. City of Atlanta, supra, by pointing out the fact that in the case last mentioned it appeared that the city, without any authority of law, caused surface water charged with filth to be "thrown upon the plaintiff's land, producing noxious scents and sickness, and rendering his premises untenantable." Let the plaintiff in the present case be afforded a fair opportunity to show by competent evidence whether or not, in point of fact, the city has been maintaining the alleged grievous nuisance of which he in his dismissed petition complained. Judgment reversed. All the justices concurring.

HILL *et al. v.* CITY OF ST. LOUIS *et al.*

(Supreme Court of Missouri, Dec. 18, 1900.)

[60 S. W. Rep. 116.]

Sewer Contractors—Special Tax Bills—Additional Remedies—Validity of Ordinance Prohibiting Connections.—St. Louis City Charter, art. 6, § 22, provides that sewer contractors shall be paid by special tax bills against adjacent property, which are liens thereon, enforceable by suit. Article 3, § 26, gives the city power to construct sewers, etc., and "to regulate the use thereof." *Held*, that the city had power to enact an ordinance (Rev. Ord. 1893, § 1630) prohibiting connections with sewers by owners of property against which there were unpaid sewer assessments, notwithstanding this gave the contractor an additional remedy for enforcing payment of special tax bills; there being nothing in the charter making the remedy provided by section 22 exclusive.

Validity of Ordinance Which Aids in the Collection of a Private Debt.—The validity of the ordinance is not affected by the fact that it aids in the collection of a private debt and is not for the benefit of the public, in that the sum charged for the privilege of connecting with the sewer is not used in paying for sewer repairs and incidental expenses; section 22 requiring such repairs and expenses to be paid out of the general revenue.

Validity of Ordinance Prohibiting Connections.*—The ordinance is not invalid because the city requires all water-closets to be connected with sewers, and because if this were not done a nusiance would result; the house owner not being compelled to have a water-closet in his house.

In banc. Appeal from St. Louis circuit court; John A. Talty, Judge.

Suit by John Hill and others against the city of St. Louis and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is a suit in equity to restrain the city of St. Louis and its sewer commissioner from issuing permits to the owners of property in Hodiamont sewer district, No. 1, to connect with the said district sewer, until the special taxes due plaintiffs as the contractors with the city and the builders of said sewer are paid. The petition shows that the city of St. Louis duly enacted a general ordinance which prohibited the connection of any private sewer with a public or district sewer unless a permit for the connection was first issued by the sewer commissioner, and which further prohibited the issue of a permit by the sewer commissioner for a sewer connection while an assessment made against the property to be drained for the construction of the district sewer remained unpaid; that while this ordinance was in force the city of St. Louis duly provided for the construction of a district sewer in Hodiamont sewer district, No. 1, and entered into a contract with the plaintiffs for the construction of that sewer; that thereon the sewer was constructed by the plaintiffs, and special tax bills issued to them in accordance with the charter of the city; that, in entering into this contract and in carrying it out, the plaintiffs relied upon the ordinance above mentioned; that

*See Slaughter *v.* N. O'Berry, 48 L. R. A. 442, and *note*.

a large number of the tax bills issued to the plaintiffs as aforesaid, to wit, tax bills amounting to more than $25,000, remain unpaid; that the plaintiffs have duly demanded payment from the owners against whom these tax bills were issued, but that such owners deny the validity of the tax bills issued against their property, and accordingly refuse payment; that these owners desire and intend to avail themselves of the sewers constructed by the plaintiffs, and to connect their respective lots and the dwellings erected thereon with these sewers, notwithstanding their denial of the validity of the tax bills and their refusal to pay the same; that the defendants, the city of St. Louis and the said sewer commissioner, pretend that said city had not the legal power or capacity to enact said ordinance, and on that ground refused to enforce any of its said provisions, and that the said sewer commissioner threatens and is about to issue, and unless restrained by injunction will issue, to each and every of the said owners a permit for sewer connection with said sewers, notwithstanding the failure and refusal of such owners to pay the tax bills issued against their lots, respectively; that, if the ordinance were enforced by the defendants, all the said unpaid tax bills would be paid at once, but that, if the same is not enforced, said permits will be issued to the owners against whose lots said unpaid special tax bills have been severally assessed, and that the plaintiffs will be deprived of the protection and benefit resulting from the ordinance, and will be put to the expense of $3,000 in the collection of said unpaid tax bills, which would otherwise be avoided and saved; and that the plaintiffs are without adequate remedy at law. To this petition the defendants interposed a general demurrer, which was overruled by the court, and thereon defendants refused to plead further, and judgment was entered against them. From this judgment the defendants have appealed to this court.

B. Schnurmacher and Chas. C. Allen, for appellants.

Collins, Jamison & Chappell and D. Goldsmith, for respondents.

MARSHALL, J. (after stating the facts). 1. The city and its sewer commissioner base their action as to issuing permits to persons in the district to connect with the district sewer, notwithstanding such persons have never paid the assessment against their property for the building of such district sewer, solely upon the decision of the St. Louis court of appeals in the case of State ex rel. Peck v. Hermann, 3 Mo. App. Rep'r, 400. Section 1630, Rev. Ord. St. Louis 1893, provides: "No permit for a sewer connection under the preceding section shall be issued, if the property to be drained by the proposed sewer, or any part thereof, has ever been assessed for the construction of district sewers, until such assessment has been paid," etc. In the Peck Case it appeared that the property of relator had been assessed for the construction of this Hodiamont district sewer; that she had

not paid such assessment; that she applied to the sewer commissioner for a permit to connect with the district sewer, and the sewer commissioner refused to issue the permit because, under said section 1630, Rev. Ord. St. Louis, she had not paid such assessment. She thereupon commenced a proceeding by mandamus to compel the sewer commissioner to issue the permit. The circuit court granted a peremptory writ of mandamus as prayed, and the sewer commissioner appealed to the St. Louis court of appeals. That court affirmed the judgment of the circuit court, and held that said section of the city ordinance was void, for two reasons: First, because the city charter (section 22, art. 6) provides for the construction of district sewers, and the assessment of the cost thereof against the property in the sewer district; provides that the contractor who builds the sewer shall be paid by special tax bills against such property in such district, makes such tax bills a lien on the property, and provides for their enforcement by suit. Hence the remedy thus afforded the contractor was exclusive, and the municipal assembly had no power to amend the city charter and enlarge the contractor's remedy as section 1630 attempted to. And, second, because, while the city charter (section 26, art. 3) gives the city express power to construct and keep in repair all bridges, streets, sewers, and drains, and "to regulate the use thereof," still section 1630 is void, because, "if it be conceded that, under the power to regulate, the city may exact the payment of a sum of money for the privilege of connecting a private sewer with a public one, to make such exaction a valid regulation the sum to be taken shall be for the benefit of the public sewers, to be used in making repairs, for inspection, or to defray some other expense which the city may be put to, to maintain and keep the system in good repair and working order, and not for the use and benefit of some private person. The sum demanded of the respondents under the ordinance was not for the benefit of the city, not to pay any debt or discharge any obligation for which the city was legally or morally bound, but a demand that they should first pay a private debt due to a private individual, and to discharge a lien on their property. The ordinance is not one to regulate the use of sewers, but its purpose is to force payment of private debts. This is beyond the jurisdiction of the city," etc. The court of appeals recognizes the force of the decisions of this court in School Dist. v. Livers, 147 Mo. 580, 49 S. W. 507, and Board v. Woods, 77 Mo. 197, which held that it is within the power of school boards to require its contractors for the erection of its school buildings to give bond to secure the claim of subcontractors and material men, notwithstanding they would have no claim against the school boards and no mechanic's lien on the buildings; but the court of appeals draws a distinction between those cases and the case at bar, and says the power existed in those cases because the subcon-

tractors and material men would otherwise be without an adequate remedy, whereas in this case the contractor who built this sewer has a full, complete, and adequate remedy, by his special tax bills being a lien on the land in the sewer district and being enforceable at law.

With great respect for the learned judge who wrote the opinion of the St. Louis court of appeals, we think he fell into error in that case, and that his decision is not supported by principle and is contrary to precedents. The charter of St. Louis provides that the cost of constructing district sewers shall be assessed as a special tax against the property in the sewer district, and that the contractor shall have no claim against the city for doing such work, but must receive tax bills for his pay, and that such tax bills shall be liens on the property, and may be enforced by suit. These charter provisions are valid and constitutional regulations. Heman v. Allen (Mo. Sup.) 57 S. W. 559. But there is nothing in the charter of St. Louis which, either in express terms, or by necessary implication or by reasonable intendment, makes the remedy thus given the contractor an exclusive remedy. Neither can the courts say it is such an adequate and complete remedy as to preclude the city, under the power conferred upon it by section 26 of article 3 of its charter, from enacting by ordinance other regulations for the use of the sewers which may have the effect of affording another remedy for enforcing the payment of such special tax bills. The fact that an existing state law provides a remedy does not prevent a municipal corporation from enacting another remedy as to a municipal matter, if it has the power to so enact, given it by its charter, either in express terms, or by necessary implication from the powers conferred. City of St. Louis v. Bentz, 11 Mo. 61; Same v. Schoenbusch, 95 Mo. 618, 8 S. W. 791; Manker v. Faulhaber, 94 Mo. 430, 6 S. W. 372; State v. Walbridge, 119 Mo. 383, 24 S. W. 457; Ex parte Kilbury, 10 Mo. App. 442; Kansas City v. Hallett, 59 Mo. App. 160; State v. Noland, 111 Mo., loc. cit. 484, 19 S. W. 715; Same v. Slover, 113 Mo. 202, 20 S. W. 788; Rogers v. Jones, 1 Wend. 237. The decision of the court of appeals in the Peck Case gives full force to section 22 et seq. of article 6 of the charter, as to the method of constructing sewers, but it overlooks the power conferred upon the municipal assembly of that city, by section 26 of article 3, by ordinance "to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof." If it had been the intention of the charter to make the remedy provided by section 22 et seq. of article 6 an exclusive remedy, the provisions of section 26 of article 3, giving the municipal assembly power, by ordinance, "to construct and keep in repairs * * * sewers," etc., would not have been put into the organic law, but the provision would have been limited to power, by ordinance, to regulate the use of sewers after they were constructed as provided for by

section 22 et seq. of article 6. So that, outside of judicial authority, as shown by the cases cited, the city has express charter authority to provide other regulations for the construction and use of sewers, besides the provisions of section 22 et seq. of article 6. These two provisions of the same organic instrument, being in pari materia, must be construed together, and full force given to both, if possible. It is possible for both to stand together. The decision of the court of appeals in effect strikes down the power conferred by section 26 of article 3, without expressly doing so, and without noticing its existence. That court must have overlooked this provision. Under section 26 of article 3, the municipal assembly had power to enact section 1630, Rev. Ord. 1893. When the plaintiffs made their bid to construct the Hodiamont sewer, they had a right to take into account and rely upon the remedy afforded by section 1630, Rev. Ord. 1893, as much as that afforded by section 22 et seq. of article 6 of the charter, and when they entered into their contract to build the sewer the provisions of the ordinance and of the charter were just as much a part of that contract as if they had been written in the contract. Hicks v. Schofield, 121 Mo., loc. cit. 388, 25 S. W. 755. The advantages and additional security afforded by section 1630 of the ordinance would naturally tend to reduce the price bid for the work, and thus the property owners themselves, who have to pay the cost of constructing the sewer, would be chiefly and primarily benefited; for it is but reasonable that, as the risks of collecting their pay for their work are increased, the price bid for the work will be correspondingly increased. The distinction drawn by the court of appeals between cases where there is no remedy afforded, as illustrated by the School-Board Cases (School Dist. v. Livers, 147 Mo. 580, 49 S. W. 507; Board v. Woods, 77 Mo. 197) and the Peck Case, where there is a remedy afforded, is not well founded. If the school boards have power to create a remedy when the law afforded none otherwise, it would be a greater enlargement of their charter powers than the creation of an additional remedy, under an express authority of charter to construct sewers and regulate their use, beyond the specific remedy of a lien and a right to sue, could possibly be. In the one instance the remedy created was not provided by law, and the power to create was not conferred expressly, while on the other the power to create such a remedy is at least necessarily implied from the power granted. In City of St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, this court held that section 26, article 3, of the charter of St. Louis, which gives the municipal assembly power, by ordinance, "to establish, open * * * and improve streets," gave ample power to the city to require a contractor for the improvement of a street to give a bond to "pay to the proper parties all amounts due for labor and material," and to entitle any laborer or material man to sue

on the bond. It was argued there, as here, that the city was not liable to the contractor for the doing of such work, and that the contractor received his pay in special tax bills, which were a lien on the property abutting the improvement, and hence it was ultra vires for the city to require such a bond to be given. The lien and the right to sue afforded by the charter for tax bills for street improvement is precisely the same as that afforded for building sewers, and the authority to order a street constructed or improved is the same section (section 26, art. 3) which authorized the building of this sewer. If the city had power to create such a remedy for the benefit of material men and laborers, and impose such an obligation upon a contractor for the improvement of a street, it had quite as much power to enact section 1630, Rev. Ord. 1893, creating the additional remedy for the collection of special tax bills. This case seems to have been overlooked by the St. Louis court of appeals. The first ground upon which that court held this ordinance provision void must therefore be held untenable.

The second ground upon which the court of appeals declared section 1630 void is also untenable. It is admitted that the city has power under section 26, art. 3, to regulate the use of sewers. But it is argued that section 1630 is not a valid regulation of the use, but is intended to aid in the collection of a private debt, and not for the benefit of the public; that, to be a valid regulation, the sum exacted from the property owners for the privilege of connecting with the public sewer must be used by the city in making repairs on the sewer, for inspection, and for maintaining and keeping the system in working order. The court of appeals again fell into error, for the very section (section 22, art. 6) which authorizes the cost of the sewer to be assessed against the property in the sewer district expressly says, "Provided, that the repairs and other incidental expenses of district sewers shall be paid out of the general revenue." It would not be competent, then, for the city to regulate the sewers by making persons desiring to connect with them pay any sum whatever to be used by the city in repairing or inspecting the sewers. Such an ordinance would indirectly make the property owners pay the cost of repairs and other incidental expenses, when the charter requires the city to pay such expenses out of general revenue. The power to regulate commerce with foreign nations is defined by the supreme court of the United States, in Gibbons v. Ogden, 9 Wheat., loc. cit. 196, 6 L. Ed. 23, as follows: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." In other words, the power to regulate the use means the power to fix the terms upon which it may be used. There is

not only nothing unreasonable about section 1630, which requires that one who desires to use a district sewer shall pay the proportion of the cost of the sewer which has been assessed against his property; but, on the contrary, it is but complete justice and fairness to the city that has provided the public improvement, the contractor whose labor and money constructed the sewer, and the other property owners who have paid or are to pay their proportion of the cost of such work. Any such regulation, where no remedy previously existed for the enforcement of such obligation, or in addition to and supplementary of some other remedy afforded by some other provision of law, finds support and countenance in fundamental principles of law, equity, and morality. If section 1630 inures to the benefit of the contractor, so does the bond required by the city and by the school boards inure to the benefit of the laborer and material men. If the city has power under section 26 of article 3 to create a remedy when none existed before, and if the school boards have an implied but not an express power to create such a remedy, then it must follow that the creation of an additional remedy pursuant to the express power of section 26 of article 3 of the city charter is certainly no more of an enlargement of the city charter than the creation of the new remedy would be. The court of appeals concedes that "under the power to regulate the city has the unquestioned authority to impose any reasonable terms and conditions upon which citizens may connect their property with its sewers"; citing City of St. Louis v. Green, 70 Mo. 562; Same v. Woodruff, 71 Mo. 92; Same v. Weber, 44 Mo. 547; Provident Inst. for Savings v. Mayor, etc., of Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; and Dill. Mun. Corp. (4th Ed.) §§ 681, 805. But, while so conceding, it holds section 1630 unreasonable and void because it requires a property owner, before using a district sewer, to pay his just and proportionate part of the cost of the sewer, which by the provisions of the organic law he is required to pay, and which commonest principles of fairness would require he should do. The conclusion is a manifest nonsequitur from the premises conceded. This conclusion is supported by the adjudicated cases and by the law writers. Judge Dillon, in his unexcelled work on Municipal Corporations (volume 11 [4th Ed.] p. 906), says that the power to construct and repair streets carries with it, without special grant, the power to construct drains and sewers, and that, "when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use, and the price at which private persons may tap them." In Ranlett v. City of Lowell, 126 Mass. 431, it appeared that a district sewer had been built, and the cost had been assessed against the adjoining property. The city ordinance provided that "the board of aldermen may grant written permission to any person to enter any main, drain or

common sewer, provided such person shall first pay the assessments." The court said: "The owners of the adjoining estates were assessed for the reason that those estates were benefited and made more valuable by being furnished with means or opportunity of securing suitable drainage. But, according to the ordinance of that city, the landowner, in order to connect his own private drain with the main sewer, was required to obtain the written consent of the mayor and aldermen, to pay his assessment, and, in the materials and construction of his drain, to comply with the directions and conditions that the mayor and aldermen might prescribe. We see nothing unreasonable or contrary to the general policy of the law in any of the provisions of this ordinance."

The case of Hermann v. State, 54 Ohio St. 506, 43 N. E. 990, 32 L. R. A. 734, is so much like the case at bar, and so directly in point, that, at the risk of prolixity, it is reproduced here.

"The plaintiffs in error constitute the board of administration of the city of Cincinnati. In the court of common pleas a peremptory writ of mandamus was awarded, on the petition of Cooper, against the board, commanding them to permit him to tap the sewer in Ashland street, upon which his residence fronts, on payment by him of the usual license fee of five dollars, but without payment of any portion of the cost of constructing the sewer. The material facts are that the city constructed a system of sewers on Walnut Hills, including the Ashland street sewer, at a cost of about $142,000. It made assessments on abutting property to the extent of two dollars per front foot, which amounted to about half the cost of construction. Some of the assessments were paid, but a portion of the property owners, including him who was then the owner of Cooper's property, resisted the assessment upon the ground of fraud by the contractor, and their defense finally prevailed. In consequence thereof the city was adjudged to pay the balance of the contract price. When Cooper applied to the board for a permit to tap the sewer, it refused to grant it, except upon compliance by him with the following rule, which it had previously adopted: 'Wherever public sewers have been constructed, and the cost thereof has been wholly or partly paid out of the funds of the city, and the owner of any abutting property makes application for permit to tap such sewer, no permit shall be issued to any such abutting owner unless he shall have paid the assessment or assessments levied against his said property for the cost of said sewer; or if for any reason said assessments have not been paid or have been released, or no assessment has been levied, no permit shall be granted unless such person shall first pay into the city treasury, for the purpose of repaying the city the amount paid out or to be paid out by said city on account of said sewers, a sum equal to an amount per front foot to be determined by taking the total cost of constructing the main and lateral

sewers and drains into which he desires to tap, and divide the gross amount by the number of front feet abutting upon said sewers: provided, however, that the amount so to be paid shall in no case exceed the sum of two dollars per front foot of the property abutting.'

"By the Court: The rule adopted by the board of administration is not inconsistent with the judgment that the assessments for the construction of the sewer in question were void. The assessments were asserted against the owners of all abutting property, whether vacant or improved. They were asserted without regard to the use of the sewer. The rule in question prescribes conditions upon which connections may be made for the actual use of the sewer. The board is authorized by section 2402, Rev. St., to prescribe rules and regulations for the tapping of sewers. Certainly it may not prescribe an unreasonable rule. In determining whether this rule is reasonable, it is important that the system of sewers of which this is a part was constructed by the city with a view to assessing the cost thereof, within the limit of two dollars per foot, upon the abutting property, which, it is admitted, the statute authorized. The rule in question was adopted and properly conditioned to require that those who had not paid assessments should, when desiring to use the sewer, accept an equal burden with those who had. We cannot say that the rule is unreasonable. Its application to this case is obvious. Judgment reversed."

It is clear that section 1630, Rev. Ord. St. Louis 1893, is a valid, reasonable, and proper ordinance regulation. It follows from the foregoing that the case of State ex rel. Peck v. Hermann does not declare the true law, and it must not, therefore, be any longer regarded as authority in this state.

2. It appears from the statement of Peck's Case, and is stated by counsel acting as amicus curiæ in this court, that the city ordinances prohibit any person from connecting a private drain with a public or district sewer without a permit from the city, and that section 442, Rev. Ord. 1893, provides that every water-closet or privy connected and used in any dwelling house within the city limits must be connected with some public, district, or private sewer adjoining the premises upon which such building is erected, and, if not so connected, such water-closet or privy shall be deemed a nuisance, and may be abated. And so it is argued by the amicus curiæ that a house owner must connect with a sewer, or be guilty of maintaining a nuisance, and that he cannot connect with a sewer unless he gets a permit from the city to do so, and that the city will not give him a permit if he has failed to pay the assessment against his property for constructing the sewer he seeks to use. This is relied on as a great hardship. Properly considered, it is only right and just. If he has a water-closet in his house, and it is not connected with a sewer, the refuse of the water-closet must be discharged either on his own land

or on the street. In either event he is creating and maintaining a nuisance to himself and his neighbors. Kirkwood v. Cairns, 44 Mo. App. 88. And this would be true without any ordinance. This evil he could avoid by not having a water-closet in his house. On the other hand, if he wants to use a sewer, it is plainly his duty to pay his proportionate part of the cost of the sewer. Otherwise, he will enjoy benefits that do not belong to him or his property naturally, and which have been furnished by the city or the contractor, without paying anything or his just share of the cost thereof. So there is no hardship or injustice in requiring him to do right and equity when he asks for equity. No ordinance compels him to have a water-closet in his house. The ordinance simply forbids him to discharge the refuse of his water-closet on his own premises or on the public streets, and this is not only legal and proper, but it is exercising a police power which the city is obliged to execute in the protection of public health. And the offense constitutes a common-law nuisance, which is not increased by the ordinance. In neither contingency is he asked to do anything but what is right and honest and proper, and, in any event, if he does not want to do right, and does not want to pay for the construction of the sewer he seeks to use, he has it in his power to escape all obligation to the city and the public by not maintaining a water-closet in his house, and by defending against the special tax bill when he is brought into court. But, whether this ordinance is valid or invalid, it in no sense determines the validity or invalidity of section 1630, and cannot in any manner impair or take away the express power conferred on the city to construct sewers and regulate the use thereof, and to prescribe the terms upon which owners of private property may connect therewith. Both sections are based upon the police power of the state, which has been delegated to the city,—the one (section 1630) in express terms by section 26 of article 3 of the charter, and the other (section 442) by paragraph 14 of section 26 of article 3 (the general welfare clause), which confers upon the city the express power "to pass all such ordinances, not inconsistent with the provisions of this charter, or the laws of the state, as may be expedient, in maintaining the peace, good government, health and welfare of the city," etc. The judgment of the circuit court is right, and is affirmed. All concur.

CAHILL *v.* MAYOR, ETC., OF CITY OF BALTIMORE.

(*Court of Appeals of Maryland, March, 4, 1901.*)

[48 Atl. Rep. 705.]

Appeal—Will Not Be Dismissed, When.—An appeal will not be dismissed because the order therefor was entered in the record more than two months after the entry of the judgment, where appellant's attorney signed an order to enter the appeal and left it in the clerk's office within

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two months after the date of the judgment, but on account of the removal of the clerk's office about that time it was misplaced.

Same—Same—Failure to Sign Exceptions within Required Time.—Where the time for signing a bill of exceptions was extended by the court because of a change in the legal department of the city government, and an agreement that the time for signing the bill was extended to allow the defendant time to examine the same was attached to one of the orders, the appeal will not be dismissed for failure to sign the exceptions within the required time.

Same—Same—Delay in Filing Record.—Where the attorney for appellant paid the costs of the case the day after he was notified by the clerk that the record had been completed, and the record was immediately sent to the supreme court, the appeal will not be dismissed for failure to file the record in the supreme court at an earlier date.

Diversion of Surface Water—Property Rights of Marine Railroad Owners—Nonsuit Improperly Ordered When Plaintiff Fails to Prove Negligence.—Plaintiffs were the lessees of a water-front lot, and marine railroads thereon, which extended into the water. The operation of these railways was rendered impossible by large deposits of sand, mud, gravel, and refuse matter deposited in the basin near them, occasioned by the defendant city constructing a wooden box in a ditch naturally carrying off the surface water, which diverted the natural drainage. *Held*, in an action for damages, that it was error to direct a verdict in favor of the defendant because of plaintiff's failure to prove defendant's negligence in the construction or location of the drain, since the gist of the action was an infringement of plaintiff's property rights.

Diversion of Surface Water—Negligent Construction of Drain—Expert Testimony Irrelevant, When.—In an action against a city for damages occasioned by the construction of a drain, thereby diverting the natural drainage of surface water, and causing it to flow into a water basin near plaintiff's property, rendering its former use impossible, expert testimony as to the negligent construction of the drain, and how it might have been built, was irrelevant, as the cause of action rested on the infringement of plaintiff's right to the property.

Negligent Construction of Sewer*—Competency of Expert Witness.—One who had been engaged in constructing and building sewers and drains for 20 years, though not an engineer, and not having a collegiate education as an engineer, was qualified to testify, as an expert, as to the negligent construction of a sewer.

Appeal from Baltimore city court; Charles E. Phelps, Judge.

"To be officially reported."

Action by Winfield S. Cahill, surviving partner of John Cahill and Winfield S. Cahill, trading as the People's Marine Railway, against the mayor and city council of the city of Baltimore, to recover damages for the construction of a drain, whereby dirt and refuse were deposited so near plaintiff's railway as to prevent its operation. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Thos. R. Clendinen, for appellant.

Wm. Pinkney Whyte and Charles W. Field, for appellee.

BOYD, J. A motion to dismiss this appeal has been made by the appellee on the ground that it was not taken within two months from the date of the judgment, which was rendered on the 6th of December, 1899. The record does show that the appeal was taken on June 27, 1900, but the affidavits filed

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; cross-reference *note* to Wilson *v.* City of Waterbury, *ante*, p. 466.

satisfy us that an order to enter an appeal was assigned by the attorney for the appellant and left by him in the clerk's office on the 3d day of January, 1900. Mr. Clendinen, the attorney, swears positively and unequivocally that he did leave such an order on that date with one of the clerks in the office, who told him that when the "court clerk," who was then out, returned, he would file the order. The Honorable Thomas G. Hayes, who had been associated with Mr. Clendinen in the case, and withdrew from it when he was about to qualify as mayor of Baltimore, swore that he saw the order, signed by Mr. Clendinen, who afterwards told him that he filed it. Another party made oath that he met Mr. Clendinen coming out of the building then used for a court house in the early part of January, 1900, who told him that he had just left in the clerk's office the order for the appeal; and other parties, whose affidavits were filed, tend to support his statement. It is true that most of the affiants had no personal knowledge of the matter, but they were told by Mr. Clendinen of the fact that the appeal had been taken at times when there could have been no possible object in making an incorrect statement about it. The affidavits show that the clerk's office was moved from the temporary quarters to the new court house shortly after the 3d of January, 1900, and it is probable that the order was in that way mislaid and omitted to be filed. The fact that the record shows the appeal was entered on June 27, 1900, is explained by the "court clerk," as well as by Mr. Clendinen. The bills of exception were not filed until then, and the clerk noticed that there was no entry of an appeal, and told Mr. Clendinen he could not send the record to this court without such an order. Mr. Clendinen replied at once that he had left the order in the office, but, as the clerk could not find it, another order was then drawn by the clerk, which was signed by Mr. Clendinen and filed. The case differs from such as Humphreys v. Slemons, 78 Md. 606, 28 Atl. 1101, and Gaines v. Lamkin, 82 Md. 129, 33 Atl. 459, where verbal orders were given, but the appeals were not entered within the time required. If it be true that the appellant did leave an order in writing within the time fixed by law, it would be a great injustice to him to deprive him of the benefit of it simply because the clerk omitted to file it and it was mislaid, without the fault of the appellant. The proof before us on that subject being sufficient to satisfy us that such was the case, we do not feel justified in dismissing the appeal under the circumstances of this case. The appellant did all he could do, and, having given the order in writing, had the right to assume it would be filed. We would hesitate to permit the affidavit of one person to overcome the presumption of the correctness of the docket entries, which shows that the appeal was taken on June 27, 1900, as he might be mistaken; but as Mr. Clendinen's positive recollection is corroborated by others (especially as to the fact that he did

actually sign the written order for an appeal), and the date of that entry is explained, we think it fair to conclude that the order was left, as he says it was, and was probably mislaid by reason of the confusion that would likely be caused by the removal of the office from one building to another about that time. The delay in having the bills of exception signed seems to have been caused by the change in the legal department of the city government. The time was extended by the court by several orders, and attached to one of them is an agreement stating: "It is agreed in this case that, in order to afford time for the defendant to examine and pass upon the bill of exceptions tendered by the plaintiff, the time for signing the same be extended," etc. They were not signed until June 27th, and, although there was then considerable delay in transmitting the record to this court, the affidavits of Mr. Lowery, the court clerk, and of Mr. Clendinen show that, the day after the former notified the latter that the record was completed, and of the amount of the cost, the latter paid it. The record was then at once sent to this court, and the appellant was not in fault for not having it here at an earlier date. The motion to dismiss will be overruled.

The appellant is the surviving partner of a firm trading as the People's Marine Railway, which was the lessee and in possession of a lot of ground in the city of Baltimore, on Jackson street, which extended to the water front, on what is known as the "Back Basin," and of certain marine railways and appurtenances. The firm built and repaired boats and scows, and also maintained a ship and spar yard upon the premises. The marine railway extended into the water of the Back Basin, adjacent to the lot, which was of considerable and suitable depth. The appellant's firm took possession of the premises in 1889, and held them until 1898, when, as he claims, they had to be abandoned by reason of the act of the appellee which is complained of in this case. There were two "ways," which had been in use 30 or 40 years prior to the time the appellant's firm got possession, when they expended about $6,000 in repairs and getting them in condition for use. The evidence tended to show that prior to the obtention of the property by the appellant's firm the rainwater, as well as surface drainage of various kinds, went down Jackson street to a point about 30 feet to the north of appellant's premises, where it entered a ditch on Fifth lane, then ran in the ditch in Fifth lane about 30 feet, where the ditch turned to the southeast, running through appellant's property, then onto other property, until it finally emptied the water and drainage into the Patapsco river, some distance from the ways, and where it did not injure the marine railways or the property of the appellant. The ground descends from the south towards Fifth lane, and that west of Jackson street is high, and in ordinary as well as extraordinary rains the drainage from those directions was conducted to the ditch, and thence to the basin.

Large quantities of clay, mud, gravel, and loose refuse and material were carried by the water through the ditch to the basin. In the latter part of 1891, or early in 1892, the defendant placed a wooden box in the ditch, and carried it to the end of Fifth lane, where it emptied into the water close to the appellants' railways, carrying sand, mud, gravel, refuse matter, and other things. These deposits, which amounted to tons in quantity, filled up the ground underneath, and went over and upon the ways, rendering the use of them impossible; and, according to the appellant's claim, they had to be abandoned. This suit was instituted to recover damages for injuries sustained by the appellant's firm by reason of this alleged diversion of the surface drainage from its usual course to the place spoken of, which resulted in destroying their business. At the trial of the case two exceptions were taken, —one to the action of the court in ruling out certain evidence which had been admitted subject to exception, and the other to the granting of a prayer offered by the defendant which instructed the jury to render a verdict for the defendant.

The prayer is as follows: "The defendant prays the court to instruct the jury that there is no evidence in the cause legally sufficient to show any negligence on the part of the defendant either in the construction or in the location of the drain in question, and the verdict of the jury must be for the defendant." It proceeded on the theory that it was necessary to show negligence on the part of the defendant, either in the construction or location of the drain, in order to entitle the plaintiff to recover. When that prayer was granted the case of Guest v. Commissioners, 90 Md. 689, 45 Atl. 882, had not been decided by this court. Whatever doubt may have existed prior to that decision as to the right of an owner of property to recover against a municipal corporation, if it collect the surface water from the streets into an artificial channel and discharge it upon his land, has been removed by that decision, although there be no negligence on the part of the municipality in doing the work. If, as is claimed by the appellant, the appellee has diverted the surface water from its usual and accustomed flow, and discharged it upon the property of his firm, by means of a ditch constructed by it, and thereby damages it, it is difficult to understand upon what principle it should be relieved of liability. Every owner of land within the bounds of a municipality may be required to suffer some injury in consequence of authorized improvements for the benefit of the public, for which he has no redress; but to permit the municipal authorities to invade the property of such owner by making it the dumping ground for such articles as may be collected in the artificial drains constructed by them is as much an infringement on his rights as if they had taken possession of it for other purposes. If it be true that the appellee did by the construction of this drain cause mud, sand, dirt, filth, and such other articles as are mentioned in

the evidence to be discharged in and about the ways of the appellant, so as to prevent the proper use of them, it cannot be permitted to escape all responsibility simply because it has legislative authority to build drains. In the case last cited the second and third counts in the declaration did not allege that the work upon the streets there spoken of had been negligently or unskillfully done, but this court held that they were sufficient, and reversed the judgment of the lower court, which had sustained a demurrer to them. It was held that when a municipal corporation, by a change in the grade of streets and the construction of drains, diverts the surface water from its natural flow, concentrates it in volume, and throws it upon the land of an abutting owner, such action is an invasion of the adjoining property, and the municipality is liable for the injury thereby caused, and it makes no difference whether the drains were constructed negligently or not. If such be its liability in changing the grade of streets, a municipality surely cannot with impunity collect the surface water in a drain, and thereby carry to the property of another such articles as those mentioned in this record, and thus destroy the use of the property. If it can empty a drain on the marine railways of the appellant, why could it not empty one on any other property in the city? The case referred to so clearly and forcibly disposes of the question that it would be useless to prolong this opinion by further discussion of it, especially as the former decisions of this court bearing on the subject are there referred to. There was error in granting the prayer.

Having determined that it is not necessary, to entitle the plaintiff to recover, for him to prove that the drain was negligently constructed or located, it does not very clearly appear how the evidence of the witness Mitchell can be relevant. We do not think he was incompetent to testify as an expert merely because he was not an engineer, and did not have a collegiate education as an engineer. He had been engaged in contracting for and building sewers and drains for 20 years, and, if the evidence of an expert was relevant, we think his knowledge and experience in work of that character were sufficiently established to have qualified him to speak as an expert. But it was not relevant to prove by an expert that this drain had been improperly constructed. The facts as to how it was built, where it emptied, what it carried, and such matters, were relevant as reflecting upon the question as to whether the defendant had violated the rights of the plaintiff. But if it be true that the defendant constructed this drain which carried the dirt, etc., to the property of the plaintiff in such quantities as to fill up the dock, it was not necessary for an expert to say that was "not a reasonable or proper mode of carrying the water down to that point." The jurors were as well qualified to judge of that as an experienced builder of drains, and it required no special skill or knowledge to do so.

Nor was it material, as far as we see from the record, to prove how the drain might have been constructed so as to avoid injury to the plaintiff. The question was whether it injured the plaintiff in the way in which it was built, and, if so, to what extent,—not whether it could have been built in some other way. Such inquiries might be relevant under some circumstances, but we do not understand how they were in this case, as presented by the record. For the error in granting the defendant's prayer, we must reverse the judgment. Judgment reversed and new trial awarded; the appellee to pay the costs.

LARRABEE *v.* TOWN OF CLOVERDALE *et al.*

(*Supreme Court of California, Dec. 22, 1900.*)

[63 Pac. Rep. 143.]

Surface Water*—Diversion onto Private Property—Nonsuit.—In an action against a town for a nuisance caused by the diversion onto plaintiff's lot of surface water running past the same, it was claimed that the water never ran there in a well-defined channel. Plaintiff testified that, from the time she went to reside on the lot in 1886, "there was a waterway at the edge of the sidewalk, * * * perhaps eighteen inches deep," crossed by "a plank about three feet long." Another witness said that the water had flowed along the street in question from the time it was graded, in 1881, and before that, for 25 years or more, had flowed along generally in the direction of the street, in "a well-defined water course and channel, meandering generally along what is now the general course" of such street. Other witnesses said that prior to 1893 there was no regular ditch along the street, but only a gutter, and that the water was confined merely by the sidewalk on one side and the rise of the street on the other. *Held*, that it was error to grant a nonsuit on the ground that there was no evidence that the stream had flowed in a clearly-defined channel.

Same—Same—Municipal Liability.—A municipality, the same as an individual, has no right to divert surface water from the channel in which it flows in a street, whether natural or artificial, and however it may have come into the street, and throw it onto the land of another.

Same—Grading Streets—Rule of Exemption Does Not Apply Where There Is a Direct Invasion of Property.*—The rule that a city, in grading a street in the regular performance of its legitimate functions, is not responsible for consequential damages, does not apply to its direct invasion of the rights of a lot owner, where it diverts water from its channel in the street, and throws it onto his premises.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Hester A. Larrabee against the town of Cloverdale and others. Plaintiff was nonsuited, and from an order denying a new trial she appeals. Reversed.

Smith & Murasky, for appellant.

James W. Oates and J. R. Leppo, for respondents.

SMITH, C. The plaintiff was nonsuited in the court below, and appeals from an order denying a new trial. The suit was

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*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *notes* to City of Hamilton *v.* Ashbrook, 4 Mun. Corp. Cas. 757.

brought to enjoin the maintenance of an alleged nuisance, and for damages suffered by the plaintiff by reason of it. The defendants, other than the town, were trustees of the town, but are sued individually. There was no evidence tending to establish the cause of action as against them, and as to them the nonsuit was rightly granted. The material facts of the case, as disclosed by the evidence, are as follows:

Plaintiff is the owner of a lot containing about two acres of land in the town of Cloverdale, fronting northwest on First, and northeast on Washington, street. First street runs northeast and southwest; but the witnesses speak with regard to it as though it ran east and west, and for convenience of expression I will adopt this usage. The plaintiff has been the owner of the lot in question since 1890, and had previously resided thereon with her husband from 1886. During all this time there was a waterway running along the south side of First street past her lot, in which during the rainy season, or at least during wet seasons, there was running water. This water, prior to 1893, crossed Washington street through a culvert, and passed on to West street, about a thousand feet further on, and thence along the same southerly to a large ditch, and into the river. But in that year Washington street was graded across First street so as to form an embankment across the waterway, and without culvert, by which the water was diverted from its former course, and made to flow along the west side of Washington street, near the east boundary of plaintiff's lot. The result was that, during the two rainy seasons following this work, the water was backed up over the land of the plaintiff, and part of her land, with 30 or 40 feet of her fence on Washington street, washed away. The channel of the water was also washed out to the depth of about 3 or 3½ feet, and to the width of 6 or 7, and access and egress to and from her land thus impeded.

One of the grounds for nonsuit was that prior to 1893 the water—which respondent claims was mere surface water—"never run there in any well-defined channel for any considerable time," and the court seems to have based the decision on this ground, or, as expressed by itself, on "the absence of a clearly-defined channel upon First street prior to 1893." But there was evidence that there was such a channel. The plaintiff testified that from the time she went to reside on the place in 1886 "there was a waterway at the edge of the sidewalk * * * perhaps eighteen inches deep, with a sandy, pebbly bottom," crossed by a "plank about three feet long." And the witness Crigler testified that the water had flowed along First street from the time it was first graded, in 1881, and before that, "for 25 or more years," had "flowed along generally in the direction of First street," in "a well-defined water course and channel, meandering generally along what is now the general course of First street." Some of the witnesses, indeed, testified that prior to 1893 there was no

regular ditch along First street, but only a gutter, and that the water was confined merely by the sidewalk on one side and the rise of the street on the other. But this is not in conflict with the other evidence, but equally establishes the existence of a "water course" or "clearly-defined channel"; and, indeed, had it been otherwise, it should, on motion for a nonsuit, have been disregarded.

The fact that the water flowed only during the rainy season, or during rainy weather, or, as claimed by respondent, was mere surface water, is quite immaterial; and it may even be admitted (though there was evidence to the contrary) that the course over which the water flowed was not a natural water course. It was sufficient that there was, and for many years had been, a definite channel, whether natural or artificial, and that the defendant obstructed this channel, and thus diverted the water onto plaintiff's land; that is to say, not only onto the west half of Washington street, which is presumably the land of the plaintiff (Civ. Code, §§ 831, 1112), but onto her lot outside the street. "An individual has no right to collect in artificial channels mere surface water, and precipitate it on the land of another. Nor has a corporation, whether public or private, the right to collect in such channels the mere surface water precipitated by rain or snow over large districts, and throw it upon the property of another." Conniff v. City and County of San Francisco, 67 Cal. 45, 7 Pac. 41. With reference, therefore, to the damage accruing from the impact of the water onto the plaintiff's land, the case comes directly within the principle cited.

And, generally, I think, the case comes within the authority of the decision last cited, and of Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375. In Conniff v. City and County of San Francisco,—which was a case very similar to this,—the channel obstructed is referred to in the course of the opinion as "a natural channel"; but the meaning of this expression is to be interpreted by reference to the actual character of the channel as shown by the pleadings and evidence in the case, and from this it does not appear to have been anything more than "a water course crossing the street," and "the channel of usual escape." We may therefore construe the term "natural channel" as including all channels through which, in the existing condition of the country, the water naturally flows. As is said in Los Angeles Cemetery Ass'n v. City of Los Angeles (pages 466, 467, 103 Cal., and page 377, 37 Pac.): "In all regions of country having a broken surface, and subject to heavy rainfall, surface water does make for itself or assume definite channels in seeking, pursuant to the law of gravitation, a lower level;" and it is also said that municipal corporations are bound to provide for the escape of surface water in all "that class of cases where the surface water, owing to the conformation of the adjacent country, has formed for itself a definite channel in which it is

accustomed to flow." In both of the cases cited the decision and language of the court must be construed as referring to the existing condition of the surrounding country, which had come, in each case, to be a part of a city, and thus materially and essentially transformed from its original condition. In each case, though the channel of egress was probably the same as before the city existed, the waters flowing to it—by reason of the grading of lots and streets—may, and, indeed, must, have been different from what before the improvement of the city naturally flowed to the same point; and it is to the conditions existing at the time of the suit, and not to those anciently or originally existing, that the decisions must be understood to relate. And this, on principle, must be the true construction of the term "natural channel," when used in the present connection; for, by the necessarily great changes that must occur in the conformation of the country in the building of a city, the natural channels for the surface water are changed; and as the changes in the ground are inevitable and legitimate, and therefore natural, the new channels, through which, under natural laws, the surface waters are discharged, must also be regarded as natural.

Some other grounds are urged by respondent in support of the judgment, to which we will briefly advert:

(1) It is claimed that the natural course of the surface waters from the canon west of the town, in which they have their source, was not along First street, but from the land of one Smith, west of the western terminus of the street, southwesterly into a ditch passing to the south of the plaintiff's lot; that the waters were diverted to the course along First street by a board fence erected by Smith about the time of the construction of the embankment across First street complained of; and that in fact the damage to the plaintiff was caused by the increased flow of water thus occasioned, and would not otherwise have occurred. To understand this position, it should be understood that prior to 1893 there was a picket fence through Smith's place, on the prolongation of the south line of First street, which in 1893 was replaced by the board fence referred to. But, as we have seen, the evidence showed that long before the year referred to the course of the water had been along First street, and that any material difference was made in the flow is a mere inference. Nor, though it were otherwise, would the liability of the defendant be affected. There is no reason to suppose that the increased flow, if any, would have damaged the plaintiff's land if it had not been turned by the defendant; and, however the water may have come into the street, the defendant had no right to turn it upon the land of the plaintiff.

(2) It is further urged that the grading of Washington street by the city was in the regular performance of its legitimate functions, and that it is not responsible for consequential damages. But the case is not one to which this principle

can apply. The act complained of was a direct invasion of the plaintiff's rights, and consequently unlawful. Conniff v. City and County of San Francisco, 67 Cal. 50, 7 Pac. 44, and cases cited. I advise that the order denying a new trial be reversed as to respondent the town of Cloverdale.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed, with reference to the respondents other than the town of Cloverdale, and as to the respondent last named it is reversed, and cause remanded for a new trial.

WESTERN & A. R. CO. *et al. v.* CITY OF ATLANTA *et al.*

(*Supreme Court of Georgia, May 22, 1901.*)

[38 S. E. Rep. 996.]

Nuisances—Power of City to Abate.*—Save and except as to those things which are by the common or statute law declared to be nuisances *per se*, or which are in their very nature palpably and indisputably such, neither the municipal authorities of any city of this state, nor any department thereof which has been given the power to abate nuisances, has the legal right summarily to compel the abatement of a particular thing or act as a nuisance, without reasonable notice to the person alleged to be maintaining or doing the same of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance.

Same—Same.—Jurisdiction to abate nuisances existing in the cities of this state having a population of 20,000 or more in a summary manner, except as to things or acts of the nature first above indicated, resides alone in the police court of the city where it is claimed such nuisance exists.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Western & Atlantic Railroad Company and others against the city of Atlanta and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Payne & Lye, Dorsey, Brewster & Howell, and Arthur Heyman, for plaintiffs in error.

Jas. L. Mayson and Wm. P. Hill, for defendants in error.

LITTLE, J. The Western & Atlantic Railroad Company and others presented a petition to the judge of the superior court of Fulton county, in which it was alleged that on February 7, 1901, certain employees of the city of Atlanta, acting under the direction of its board of health, began to forcibly take up and remove the floor of the building in that city known as the "Union Passenger Depot," which is used as a railway station by all the railroads passing through or having

*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *notes*, 3 Mun. Corp. Cas. 34, 163, 171; 1 Mun. Corp. Cas. 418 *et seq.*; 2 Mun. Corp. Cas. 554, 610.

terminals in said city. The board of health
on the ground that the floor sought to be
nuisance endangering the public health. T
alleged that the floor, which was of wooden
good sanitary condition, and in the same con
it was when the building was erected, and wh
was leased to the plaintiffs by the state, wh
was and is, and that they had always kept t
repair, substituting new plank for the old whe
that the board of health had ordered them to r
and place in its stead an asphalt floor, or one
board, but because it was unnecessary, and
expensive, and for other reasons specified, th
ply with this order; that not until January,
any complaint calling the attention of the
sanitary condition of the floor; that about th
water in the streets, caused by excessive ra
flooded the floor, and the plaintiffs, supposing
rise to the complaint, and desiring that the
should conform to the views of the city autho
the city engineer to prepare plans for the dra
face water, which he did, and these plans w
in the construction of sewers, after which nea
in the floor were removed, and new plank
since that time the floor has not been flooded
further alleged that the board of health had
over the question as to whether the condition
a nuisance or not; that this is a judicial que
plaintiffs were entitled to be heard before thei
be condemned and abated as a nuisance; th
legal notice of any action proposed to be tak
of health necessary to condemn the floor as a
after the repairs above mentioned were mad
any kind was taken by the board of health de
dition of the floor as it existed on February
nuisance; and that under the law applicabl
Atlanta the board of health has no power to
question as to what constitutes a public n
being a city of more than 20,000 inhabitants,
at so what constitutes a nuisance being ves
tribunal. It was alleged that thus removing
building will result in great inconvenience t
public, and in irreparable damage to the pla
the individuals doing the damage were
defendants, in their answer, denied the all
petition as to the sanitary condition of the fl
their reasons for treating it as a nuisance.
that under the existing conditions at the
floor could not be made of wooden plank.
under the charter of the city the board of healt
authority to abate nuisances summarily, and

judicial proceedings, and that this authority is not affected by the general law; that, in accordance with authority granted by the charter, the mayor and general council of the city adopted an ordinance providing that the board of health "shall have full power and authority to require the owner or occupant of a lot in the city to remove or remedy anything on said lot which, in the opinion of the board, may endanger the public health, and on failure of the owner or occupant to remove or remedy the same the board shall direct the chief sanitary inspector to do so at the cost of said owner or occupant"; and that the removal of the depot floor was undertaken in accordance with the authority thus granted. It was denied, however, that the board was proceeding arbitrarily, and without notice to the plaintiffs. The answer averred that more than a year before the action complained of the board ordered the plaintiffs to remove the floor because of its unsanitary condition, and the plaintiffs, through their representatives, appeared before the board, and admitted that the floor was in this condition, and that a plank floor could not be kept in sanitary condition, and agreed that if, by December 1, 1900, no definite plans for the construction of a new depot should be agreed on, they would proceed without further delay to construct a permanent floor of garnitoid, asphalt, or other material, satisfactory to the board of health; that the board, after the thorough investigation then had, adjudged that the condition of the floor was a nuisance, and directed the chief sanitary inspector to make cases in the recorder's court against the plaintiffs, and to abate the nuisance, unless it was remedied; that shortly before December 1, 1901, and at different times afterwards, the board of health communicated with the plaintiffs as to the condition of the floor, urging compliance with this agreement, and received assurances from the plaintiffs' representatives in charge of the depot (known as the "board of control") that the agreement would be carried out, and at their instance more time was granted them, the last extension granted being until February 2, 1901, but no further action was taken by the plaintiffs, except to request a delay until February 7th, and on that date the defendants, deeming it useless to delay further, undertook to remove the floor, and replace it with a permanent floor of such character as would be sanitary, and prevent the accumulation of water in and about the building. The evidence submitted on the question as to whether the condition of the depot floor was a nuisance endangering the public health was conflicting. The court admitted in evidence, over the objections of the plaintiffs, a resolution of the board of health, adopted February 2, 1900, declaring the condition of the depot floor to be a nuisance; an agreement by the board of control, representing the plaintiffs, the substance of which is stated in the answer of defendants; certain correspondence passing between the board of

health and representatives of the plaintiffs; the minutes of the plaintiffs' board of control; and testimony as to what took place at a meeting of the board of health, and as to the action taken by the board. An injunction was refused, and the plaintiffs excepted not only to the order refusing an injunction, but also to the overruling of objections made by them to the evidence as above set forth, which last ground, in view of the ruling made in the case, need not be considered. The assignment of error as to the refusal of an injunction is that it was against the equity of the case, and was in violation of the fourteenth amendment of the constitution of the United States, in that it deprived the plaintiffs of their property without due process of law, and that under the facts and law of the case the court had no discretion except to grant the injunction as prayed.

No detailed statement of the evidence contained in the record is deemed to be necessary, but reference to such parts of it as becomes material will be considered in the discussion of the legal propositions by which the case is controlled. We shall undertake to establish two propositions as being sound in law, and controlling in this case. The first is that neither the municipal authorities of any city in this state nor any department of a city government has the legal right summarily to abate a nuisance, without first having given reasonable notice to the person maintaining the thing or doing the acts alleged to be a nuisance of the time and place of hearing the question whether such thing or the doing of such acts constitute a nuisance, and the determination by such body that the thing so maintained or the acts done in law constitute a nuisance, and this rule of law applies to all acts and things alleged to be nuisances except those which are by the law expressly declared to be nuisances, or which are indisputably so per se; and that this is true notwithstanding the municipal authorities, or any department thereof, have, by the charter of the town or city, been given the power to abate nuisances in such city. The second proposition is that under the law in force in this state jurisdiction to abate nuisances existing in a city of 20,000 population or more, except the specific acts done or thing maintained are declared by the common or statute law to be a nuisance, or which are indisputably so per se, resides in the police court of such city. We are aware that in entering the domain of the discussion necessary to support the proposition first above stated we will encounter seemingly contrary rulings in many adjudicated cases, and opposed in treatises by learned text writers. On the other hand, the principles there announced are, we think, supported by reason, a due regard to the right of protection of the property of the citizen, favored by all courts, and the distinct current of the general authorities, and are recognized by our statutes. We eliminate entirely from the discussion reference to the rights of a private person to abate a public or private

nuisance by his own act, for the reason that the principles of law which establish his right and fix his responsibility in so doing are not involved in this case, because when, according to the admitted fact, certain members of the board of health of the city of Atlanta undertook to remove the floor of the Union passenger station on the ground that it was a public nuisance maintained by the lessees thereof, which menaced the health of the city, this undertaking was for and in behalf of a recognized governmental department of the city, and the question involved does not turn upon the question whether those members of the board of health who instituted such proceedings had or had not legal authority from the board so to do. It is sufficient for the purposes of this discussion that they assumed to do what was done in the name of that body. Nor do we think that the fact that the Union passenger station was the property of the state of Georgia, which had been leased to one of the plaintiffs, would prevent the lawful abatement of a nuisance existing in such station building and maintained by the lessee. Reference was made in the argument to the legal principle that the state is not included in the operation of a general law unless included eo nomine. The proposition is sound, but not applicable to the facts of this case. Assuming that the floor of the building which was sought to be removed as a nuisance was the property of the state, it is uncontested that such removal was attempted to be had for the purpose of replacing the plank floor with a permanent, and more costly one, at the expense of the lessees; and, had this purpose been accomplished, no loss or deprivation of property would have been occasioned to the state. With these suggestions as a passing reply to the point made, we proceed to the discussion of the first proposition stated above.

By an act of the general assembly, approved February 28, 1874 (Acts 1874, p. 116), a new charter was established for the city of Atlanta, in which, by section 67, the mayor and general council of the city were authorized to appoint one proper and fit person from each ward as a board of health, and it was made the duty of said board to report to the mayor and general council all nuisances which were likely to endanger the health of any portion of the city, and the mayor and general council were given power, upon the report of the board of health, to cause such nuisances to be abated, and its recommendations were to be carried out in a summary manner at the expense of the party causing the nuisance, etc. By section 71 it is provided that the board of health of the city of Atlanta may exercise the same power as is now vested in the mayor and general council of said city relating to the abatement of such nuisances as are likely to endanger the health of the city to such extent and under such regulations as may be prescribed by the mayor and said general council. Perhaps, by the original and amended charter of the city, further

plenary powers in this respect were conferre
assume, for the sake of the argument, that the
was invested both by the charter and munici
with the power to inquire into, and, concurr
mayor and general council, to abate, nuisance
here be noticed that the manner of such aba
be summary, and by the officers of the police
the city, under proper order. It must not b
however, that the use of the term "summa
implies that it shall or may be done without pr
tion of the facts, or that it may be done withou
opportunity to be heard by the person who,
committed the acts, or whose property is sought
A summary proceeding is thus defined by Mr.
form of trial in which the ancient, established
proceedings is disregarded, especially in the
by jury," etc. And this eminent lexicogr
Blackstone and Chancellor Kent, together wit
adjudicated cases, says, referring to such a pr
in no case can a party be tried summarily un
ceedings are authorized by legislative authorit
haps, in cases of contempt; for the common la
to such a mode of trial. Mr. Black defines a
ceeding to be "any proceeding by which a
settled, case disposed of, or trial conducted in
ple manner without the aid of a jury. * * *
are said to be summary when they are short
comparison with regular proceedings; that is,
ceedings which alone would have been applicab
same or analogous cases if summary proceedings
available." So, then, the power given to abat
a summary manner does not at all mean tha
abated without notice or hearing, but simply
done without a trial in the ordinary forms pre
for a regular judicial procedure; and the ab
nuisance by the municipal authorities, after
and determination that a nuisance exists, on th
police officer, is a summary proceeding. Indee
be contemplated by the definitions referred to t
proceeding involves some kind of a trial; so
board of health was invested with power to ab
in a summary manner, they were not necessarily
the power to do so in the absence of any trial
the facts without notice. The weight of auth
own statute is to the effect that, as to nuisanc
acter which the board of health alleges the flo
senger station to have been, it cannot lawf
without notice, and a judgment of the tribunal
invested with power to abate. In the case of Y
Milwaukee, 10 Wall. 497, 19 L. Ed. 984, the su
the United States ruled two propositions: F

question of nuisances or obstructions must be determined by general and fixed law; second, that it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance in such a summary mode (referring to the case), and enforce its decision at its own pleasure. In the case under consideration in that court it appeared that the legislature of Wisconsin had authorized the common council of the city of Milwaukee by ordinance to establish dock and wharf lines along certain rivers, to restrain and prevent encroachments upon said rivers and obstructions thereto; and the city, by an ordinance, had declared a particular wharf to be an obstruction to navigation, and a nuisance, and ordered it to be abated. An injunction was applied for to enjoin the city from interfering with the wharf ordered to be abated. In the course of his opinion in that case Mr. Justice Miller says: "The mere declaration by the city council of Milwaukee that a certain structure is an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless in fact it had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general law either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." In the case of Hutton v. City of Camden, 39 N. J. Law, 122, 23 Am. Rep. 203, it appears from the report that by the charter of the city of Camden the common council was authorized to establish a board of health, and to define its powers and duties. That such council was authorized in its charter "to abate or remove nuisances of every kind at the expense of those maintaining the same, and to compel the owner or occupant of any lot, house, building, shed, cellar, or place wherein may be carried on any business or calling, or in or upon which there may exist any matter or thing which is or may be detrimental, in the opinion of the sanitary committee or board of health, * * * to the health of the inhabitants of the city, * * * to abate the same * * * under the direction of the city council," etc. Under this power the council passed an ordinance establishing a board of health, and provided that, whenever the board of health should deem it advisable for the public health of the city forthwith to abate or remove any nuisance in the city, it was authorized and directed to cause the same to be abated at the expense of the owner. It further appeared that at a meeting of the board of health on a particular day a resolution was passed that a lot of a citizen on a certain street was declared to be a nuisance, and the owner was directed to fill it up to grade. The order not being complied with, the city did the work

at considerable cost, and, the owner refusing to pay it, an action was instituted to recover it. Referring to this declaration of the board of health that the lot was a nuisance, Chief Justice Beasley said: "Giving, therefore, to this resolution the utmost legal effect that can be ascribed to it, by conceding to the sanitary board a judicial capacity in the premises, still its action must be regarded as entirely void, inasmuch as it appears that it had not acquired jurisdiction over the plaintiff in error. The proceeding was coram non judice, and as such was not merely voidable, but was an absolute nullity." Judge Dillon, in his great work on Municipal Corporations, in referring to nuisances, and of the power to prevent and abate them, says: "It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority, and its summary exercise, may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." 1 Dill. Mun. Corp. (4th Ed.) § 374. Mr. Wood, in his treatise on the law of Nuisances (volume 2, p. 977), says: "A municipal corporation which is empowered to declare what shall be nuisances is not thereby authorized to declare that to be a nuisance which is not so in fact. Things which may or may not be nuisances, where their character in this respect depends upon circumstances, cannot be so declared in advance. The question when the thing may or may not be a nuisance must be settled as one of fact, and not of law." "To determine what is by law a nuisance is an exercise of judicial power." State v. Noyes, 10 Fost. 294. In the case of City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693, it was ruled that things which were not nuisances per se must lawfully be ascertained to be such, and the municipal authorities could not arbitrarily declare a thing a nuisance, or destroy valuable property which is lawfully erected or created, without such lawful ascertainment; and except in exceptional cases, or where the thing is clearly a nuisance itself, it should be judiciously determined. In Darst v. People, 51 Ill. 286, it was ruled that intoxicating liquors could not be taken away or removed, under an ordinance declaring such liquors kept within the town limits to be a nuisance, before it had been judicially declared that the ordinance had been violated. But, as conclusive of the question, so far as this state is concerned, we have only to refer to a provision of our law which has been in force since 1833, and which is found in Civ. Code, §§ 4760–4763. The first of these sections provides that a nuisance may be abated by the order of two or more justices of the peace in the county where it exists, found upon the opinion of a jury, and

the order shall be executed by the sheriff of the county, or his deputy. A further provision declares that, if the nuisance complained of exists in a town or city under the government of a mayor, etc., such nuisance may be abated, with the advice of the aldermen or council, by order of the mayor; and, referring to this provision, section 4763 expressly declares that reasonable notice shall be given to the parties interested of the time and place of the meeting of such justices and freeholders, or such mayor, intendant, aldermen, etc. These provisions constitute a general law of this state. It is, however, claimed that the charter of the city of Atlanta was enacted subsequent to the passage of the act which contains these provisions, and, that being so, the provisions of the charter have the legal effect of rendering inapplicable the provisions of the statute to the city of Atlanta; and the case of Mayor, etc., v. Minor, 70 Ga. 191, is relied on for the proposition that the special authority granted to the board of health by the charter of Atlanta was not affected by prior or subsequent general laws. Without conceding that the case referred to is authority for the proposition that the charter of Atlanta was not affected by a subsequent law,—which proposition will be discussed in another part of this opinion,—we must, in fairness, accept the ruling made in that case as sustaining the proposition that a prior general law providing for the abatement of nuisances does not prevent the legislature from subsequently conferring such power on the municipal authorities of a city. In that case, as we understand the facts, the authorities of the town of Montezuma sought to abate as a nuisance a mill pond from which was operated a grist mill. To this attempt the defense was interposed by the owner that, if it was a nuisance, the same could not be abated by the authorities of the town, because under the act of 1833, referred to above, the ordinary of the county alone had jurisdiction, and that the affidavit of two or more free holders was a condition precedent to the right of the ordinary to summon a jury and adjudge whether the mill and adjacent water were in fact a nuisance. This court ruled that, the act incorporating the town of Montezuma, being subsequent to the act of 1833, by its terms devested the jurisdiction of the ordinary, and vested the power to abate nuisances within its limits in the authorities of the town; and under the charater of the town the municipal authorities had full power to abate a nuisance on the report of the board of health, although such nuisance consisted of a mill and machinery run by water. But how does the ruling there made affect the validity of the act of 1833 as to the requirement of notice to the parties interested of the time and place of the meeting of the mayor and council, at which the question of the existence of the nuisance is to be determined? The only change in this general law which the Minor Case, supra, effects is that the ordinary was deprived of the juris-

diction which the general law conferred on that officer within the limits of the town of Montezuma. It only effected a substitution of one governmental agency for another, leaving the act of 1833 otherwise of full force and effect, and especially that part of it which declares that reasonable notice shall be given to the parties interested of the time and place of meeting of the mayor and aldermen. No change in this provision was caused by the act incorporating the town of Montezuma, and no change was effected in this provision, as we think, by the act creating a new charter for the city of Atlanta. It was a summary proceeding to abate a nuisance when done by the ordinary and a jury. It is none the less a summary proceeding when, after notice, the nuisance is ordered to be abated by the mayor or board of health.

Another proposition is relied on by the defendant in error to sustain its theory of the law of the case, to wit, that, where a duty is imposed, or a discretion vested, in a person or body, the exercise of this discretion is final. The proposition is undoubtedly sound, as stated; but, while it is so, it is fundamental law that the performance of the duty, and the exercise of the discretion, in a case where personal liberty or private rights are involved, cannot legally be had in the absence of a notice to the person interested, that he may have an opportunity to contest the facts in relation to which such person or body is to exercise its discretionary power. The case of Mayor, etc., v. Mitchell, 79 Ga. 807, 5 S. E. 201, is not at all in conflict with the proposition which we are endeavoring to sustain. In that case it appears that the municipal authorities were seeking to abate as a nuisance a mill pond within the limits of the city, and by the answer it appears that there was a judgment of the mayor and aldermen condemning the pond as a nuisance. A bill was filed seeking to enjoin the authorities from proceeding to destroy the dam which collected the water in the pond, on the ground that it was not a nuisance; and this court ruled that, under the charter and ordinances of the city, the mayor and council, on the recommendation of the board of health, had full power, in a summary manner, to abate nuisances, and that it was for that body to determine whether it was a nuisance or not. If they came to the conclusion that it was, they had the right to abate it in a summary manner. No point was made by the owner of the mill that he had no notice of the proceedings which were had under which his property was declared to be a nuisance. It is evident, however, that such proceedings were had from the fact that there was a judgment of condemnation by the mayor and aldermen. The only complaint was that this judgment was wrong. The effect of the ruling made is that a court of equity will not interpose to enjoin the execution of the judgment rendered on the ground that the finding was wrong. This case does not, in our judgment, construe the section of our Code requiring notice to the persons interested

differently from the view which we now take of it. In Dunbar v. City Council, 90 Ga. 390, 17 S. E. 907, cited by counsel for defendant in error, Chief Justice Bleckley said, in his opinion rendered in the case, that it was evident that the board of health did in fact consider and decide that the corn was dangerous to the public health, and that the chief, if not the only, reason suggested against the binding force of that decision is that it was made without notice to the owners of the property. As meeting this point fully and entirely, this eminent jurist said: "But, according to the authorities, notice was not essential except for the purpose of rendering the decision conclusive; the nuisance in question, if one at all, being a nuisance at common law." We are not contending that where the particular thing or the act sought to be abated is made a nuisance by statute, or is characterized as such by the common law, any inquiry or notice is necessary, because the question as to whether it is in fact a nuisance is already determined; but when the act or thing is not made so by the common or statute law,—as in this case,—the fact whether it is or is not a nuisance is a judicial question, to be passed upon by the tribunal having power to abate it, after notice to the party interested. The case of Mayor, etc., v. Mulligan, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, is cited on this point by the defendant in error in support of its contention, but we think the ruling made in that case does not require a different construction of the statute providing for notice from the one we have given to it. In that case Mulligan instituted an action against the city to recover the value of a feather bed, pillows, and a mattress destroyed by a sanitary inspector under orders of its health officer. This court ruled there that, unless the property destroyed was itself a nuisance endangering the public health or safety, it was wrongfully destroyed; but, if it did so endanger the public health, it might be destroyed by the authorities lawfully, and without paying the owner its value, if the charter of the city confers on it the power to abate such nuisances. The decision was based upon the provisions incorporated in section 1456 of the Political Code, as follows: "Analogous to the right of eminent domain is the power from necessity vested in corporate authorities of cities, towns, and counties to interfere with, and sometimes to destroy, the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of a conflagration, or the taking possession of buildings to prevent the spread of contagious diseases." By the facts of the case "it was shown conclusively," said Chief Justice Simmons, who delivered the opinion, "and beyond question, that the property destroyed was in fact a nuisance endangering the public health, having been used by a person who had scarlet fever, a highly dangerous disease; and the mayor and aldermen of the city, under its charter, had ample authority to abate the nuisance in

question." It may be well to consider at this point for a moment the power of municipal authorities to abate certain nuisances without any proceedings whatever except to order their abatement. These are, we think, not only such things as are by the law declared to be nuisances, but also those which are indisputably so per se. In each of these cases, a necessity exists to destroy private property in order to protect the public. Vicious animals, which are accustomed to attack a man, are nuisances, and under certain circumstances, may be killed without any proceedings whatever, either by a private person or by order of the municipal authorities. It is a public nuisance for one who is infected with an infectious or contagious disease to expose himself in a public place. To take a horse infected with glanders into a public place is such. Mr. Tiedman, in his work on Municipal Corporations (section 120), citing Ferguson v. City of Selma, 43 Ala. 398; Nolin v. Mayor, etc., 4 Yerg. 163; North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 207, 44 Am. Rep. 788; Hart v. Mayor, etc., 9 Wend. 571, 24 Am. Dec. 165,—declares that, where the property or act is per se a nuisance, the power of the municipality is unquestioned, though its exercise may involve the destruction of private property. In his work on Limitations of Police Power (section 122g) the same author declares that in certain cases of extreme necessity the private individual may, without the aid of the government, abate or remove the nuisance (referring to a public nuisance); in other cases the government, through its proper department, must interfere. In the Mulligan Case, supra, the property destroyed was a nuisance per se, which threatened the health of the people generally. Being a nuisance per se, there was no necessity for any inquiry; hence no need of notice. The further-cited case of Morris v. City of Columbus, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, has, we think, but little application to the point now under discussion. Morris questioned the constitutionality of the act of the general assembly which had conferred upon the city of Columbus authority to require vaccination, and the court simply ruled that, in the exercise of the police power, the general assembly might confer upon the authorities of the city power to make and enforce an ordinance requiring all persons within the limits of the corporation to submit to vaccination, whenever an epidemic of smallpox is existing or may be reasonably apprehended. The only question of fact which could arise in that case was whether the occasion for the enactment of such an ordinance had arisen. And on an entirely different principle from any which we have invoked the municipal government must, of course, be the final and conclusive arbiter as to the existence of such conditions. It is our opinion that the provisions of our Code require, when a municipal corporation is seeking to abate a nuisance, such as it was alleged the floor of the Union passenger station was in this case, that the parties interested be given reasonable

notice of the time and place of hearing at which the fact whether the property complained of is or is not a nuisance shall be inquired into and determined; that without such notice, and a judgment on the facts by the body invested with power to abate the nuisance, it is unlawful to enter thereon, and remove or destroy it as a nuisance. If the thing, as we have said, is declared by law to be a nuisance, or if it is unquestionably a nuisance,—such as a rabid dog, infected clothing, the carcass of a dead animal on a private lot, the presence of a smallpox patient on the street,—it may be abated by the municipal authorities at once, by order, from the necessity of the case, and to meet an emergency which exists to at once protect the health and lives of the people.

2. We now proceed to the consideration of the second question presented, namely, upon what department of the municipal government, under the laws of this state, devolves jurisdiction to abate nuisances in a city having a population of 20,000 or more? The provisions of the act of 1833, which are incorporated in section 4760 of the Civil Code, declare that any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health and safety, or tends to corrupt the manners and morals of the people, may be abated, etc. And it is only such nuisances as these that the act of 1833 refers to when, as codified in section 4762, it declares they may be abated by order of the mayor or aldermen when they exist in incorporated towns. It will be noted that a nuisance injurious to the public health is expressly brought within its provisions, and that to this class of nuisances the entire act refers, including, as we have previously shown, a requirement that reasonable notice shall be given to interested parties of the meeting of the mayor and aldermen to pass on the same before the order is issued. This act of 1833 is a public law, but, as was seen in the Minor Case, supra, it was ruled by this court that, notwithstanding it was a public law in force in 1871, the provisions in the charter of the town of Montezuma, passed by the legislature in that year, rendered inapplicable as to the abatement of nuisances in that town so much of the act as provided that, where the nuisance complained of was a grist mill, it should be abated by the ordinary and a jury of the county. Practically, this is the effect of the ruling made in that case. Other than to the town of Montezuma, and other towns and cities in which its operation has been specially suspended by charter provisions, this act remains in full force. By an act approved September 4, 1889, the general assembly amended the charter of the city of Atlanta, and, among other particulars, the caption of the act recites that it is "to confer upon the recorder's or mayor's court of said city the jurisdiction now devolving upon the mayor and general council in the trial and abatement of certain nuisances as provided by the law of the state as contained in" certain sections of the Code of

Georgia. The amending act declares that the jurisdiction now vested in the mayor and general council of said city under and by the laws of this state as contained in the Code (1882) in sections 4094 to 4100, inclusive, in respect to the trial and abatement of nuisances, as set forth in said Code and sections, be, and the same is hereby, devolved upon and vested in the recorder's or mayor's court of said city. "Said recorder's court shall have the same jurisdiction, power and duty as to the trial and abatement of said nuisances as the mayor and general council of said city has heretofore had, and said mayor and general council are hereby relieved of jurisdiction and duty to try, hear or abate such nuisances, provided and except that nothing in this act contained shall divest the mayor and general council and board of health of said city of jurisdiction as to nuisances affecting health, as now provided by law." So that this act, by its terms, conferred upon the recorder's or mayor's court of the city of Atlanta all the jurisdiction as to the trial and abatement of nuisances contained in the act of 1833 in respect thereto, and those which were conferred on the authorities of the city of Atlanta by its charter, except jurisdiction as to nuisances affecting health. It will here be noted that this enactment was had subsequent to the adoption of our present constitution, which declares that "no special law shall be enacted in any case for which provision has been made by an existing general law." The act of 1833 was, as we have seen, a general law. The act of 1889 amending the charter of the city of Atlanta was a special law. The general act provided that nuisances in a town or city should be abated by the mayor and aldermen, etc. The special act conferred jurisdiction to abate such nuisances (or a class of them) in the recorder's or mayor's court. The special act recognized as applicable to the city of Atlanta the provisions of the act of 1833. Now, admitting, under the authority of the Minor Case, supra, that prior to the adoption of the constitution of 1877 the general assembly could, by the terms of a special act, vary the terms of a general law as to the abatement of nuisances in a particular city, it is difficult to perceive how, under the provisions of the constitution, the terms of a general law could be thus varied in 1889. As illustrating the serious import of that question, attention is called to the case of Connor v. Hall, 89 Ga. 257, 15 S. E. 308. After the passage of this amendment to the charter in 1889, Hall & Co. filed a petition in the recorder's court asking for an order to abate an alleged nuisance (a fence across an alley). This application was resisted, and a plea to the jurisdiction of the recorder was filed. After an adjudication, that the nuisance existed, and an order by the recorder that it be abated, the defendant sued out a certiorari to the superior court, alleging that the judgment was contrary to the law and the evidence. The certiorari was overruled, that judgment was excepted to, and the case brought here. This court,

after ruling on a point not material to be considered in this connection, ruled that, as no question as to the jurisdiction of the recorder was raised, and it was not apparent that the judge of the superior court erred in affirming the judgment of the recorder, the judgment was affirmed. Subsequently the defendant in that judgment filed an application to enjoin its enforcement on the ground that the recorder had no jurisdiction to try the same, and that the judgment rendered by him was void. The allegation of a want of jurisdiction in the recorder rested on the unconstitutionality of this act of 1889, because it was in conflict with the provision of the constitution to which we have just referred, and thereupon the plaintiff proposed to show that the erection of the fence was not a nuisance. The trial judge refused this evidence, and ruled that the question of jurisdiction was settled by the former judgment, which was conclusive of every question that was or might have been made, and denied the application. In ruling upon the correctness of that judgment this court said that, when it appeared that a person was cited before the recorder's court to show cause why he should not abate a nuisance; that he appeared, and among other defenses pleaded to the jurisdiction of the court; that the plea was overruled, and the case tried upon its merits, and he was ordered to remove the nuisance, and thereupon took the case to the superior court by certiorari, and did not assign error upon the judgment overruling the plea to the jurisdiction,—there was no error in refusing to grant such person an injunction to prevent the city marshal from enforcing the judgment by removing the nuisance. Connor v. Hall, 91 Ga. 62, 16 S. E. 266. It would thus seem that the constitutionality of this amendment to the charter of Atlanta was at least doubted. Subsequent to these decisions (the latter having been rendered October 31, 1892) the general assembly passed a bill which was approved December 12, 1892, to amend the provision of the Code which, as part of the act of 1833, declared that, if the nuisance existed in a town or city, it might be abated and removed by order of the mayor, etc. This amendment was proposed in a bill introduced by Mr. King, one of the then representatives of the county of Fulton. Journal House Rep. 1892, p. 61, and which afterwards became a general law, was in the following words: "But if the nuisance complained of exists in a city having twenty thousand population or more the police court of such city, whether known as mayor's or recorder's court, or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or marshal of said town or city or their deputy;" and that all laws and parts of laws in conflict with the foregoing are thereby repealed. So that the general law of 1833, which provided that nuisances in a city might be abated by the

mayor and aldermen, was thus amended by the act of 1892, so that, if the nuisance existed in a city having a minimum population of 20,000, the jurisdiction to abate the nuisance should be exercised by the police court of that city; and not only so, but the officer presiding in that court should hear and determine the question of its existence before ordering its abatement. And it appears that such change was at the instance of the city of Atlanta through one of its worthy and able representatives. No other conclusion can be drawn from this enactment than that all the power conferred on the city of Atlanta (including its board of health) to abate a nuisance manifestly injurious to the public health was taken away thereby, and jurisdiction thereof vested in the mayor's or recorder's court for hearing and determining the question whether such nuisance exists. It must be understood, however, that in so ruling those things which are declared either by the common or statute law to be nuisances, or which are nuisances per se, and from their very nature are indisputably so, are not included either in the ruling or in what has been said in the way of argument. As we have endeavored to show in the first division of this opinion, as to them no inquiry is necessary, because they have been so pronounced, or their character as such cannot be denied. In opposition to the view which we have just taken of the nature of the act of 1892, it is claimed that that act does not operate as a repeal of the provisions of the charter of the city of Atlanta as to the abatement of nuisances, and it is urged that repeals by implication are not favored. We assent to the correctness of the latter proposition, but, while not favored, the repeal of the special statute or particular parts thereof results by operation of law under certain well-defined rules. If this act repeals the charter provisions of the city of Atlanta, such repeal is by implication; and just here it may be observed that the test whether such repeal has been affected is whether it was the intention of the general assembly that such should be its effect. Concerning the repeal by implication of a general law by the enactment of another general law, Mr. Sedgwick, in his work on the Construction of Statutory and Constitutional Law (2d Ed., p. 104), says: "It is equally well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and, even if the subsequent statute be not repugnant in all its provisions to a prior one, though, if the latter statute was clearly intended to prescribe that only rule which should govern in the case provided for, it repealed the original act." Mr. Sutherland, in his work on Statutory Construction (page 179), says, on the same subject: "An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonious with the terms and necessary effect of the earlier act." To the same effect, see, also, Potter, Dwar. p. 154, and End. Interp. St. p. 280, with which

rule the decisions of this court are in harmony. Girardey v. Dougherty, 18 Ga. 262; Erwin v. Moore, 15 Ga. 361; Johnson v. Association, 97 Ga. 622, 25 S. E. 358. The exact question, however, is whether the repeal of a special act is necessarily effected by the enactment of a general law covering same subject; and it must be conceded that, as a rule, this effect is brought about less readily than where both the repealed and repealing statutes are in the form of general laws. Nevertheless, it rests upon the intention of the lawmakers, and we apprehend that the rule is that, when a general law is enacted, making certain provisions in relation to all the towns of this state, and the provisions of the enactment clearly manifest that it was the purpose of the lawmakers to establish a given condition in all of such municipalities, the terms of such general law will supersede the rights and powers given to any particular municipality by its charter. Citing a number of authorities for the proposition, Judge Dillon (in 1 Dill. Mun. Corp. § 85), says: "The powers conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a general law operating upon the whole state, or, in the absence of constitutional restriction, by a special act." Also, upon the authority of a number of later cases for his text, Mr. Tiedman, in his treatise on the law of Municipal Corporations (section 32), declares: "The powers and privileges conferred upon a municipal corporation by act of the legislature may at any time be repealed or amended by the legislature, either by a general law applicable to all municipal corporations throughout the state, or, in the absence of constitutional limitations, by a special act applying to the particular corporation." It was ruled by the supreme court of Pennsylvania in the case of Nusser v. Com., 25 Pa. 126, that a general act prescribing the mode of punishment of a specific offense throughout the state operates the repeal of an act limited to a single county prescribing the mode of punishment for the same offense within the designated county. To the same effect, see State v. Pearcy, 44 Mo. 159, in which case the repeal seems to have been based on the proposition that by the enactment of a general law it was the manifest purpose of the legislature to produce uniformity. A number of authorities are cited in note 1, p. 214, by Mr. Sutherland (in his work above cited), to support what he declares to be the doctrine in such cases, which the text states as follows: "There is no rule of law which prohibits the repeal of a special act by a general one, nor is there any principle forbidding such repeal without the use of words declarative of that intent. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general statute is sufficiently manifested when the provisions of both cannot stand together." In the case of Pausch v. Guerrard, 67 Ga. 319, this court seems to have recognized the rule above announced as law in this state when

it ruled that "while, ordinarily, a general law does not repeal a prior local law, unless the law be specially named or necessarily embraced in the terms used, yet where it is apparent from the act itself and the constitution of the state that it was intended to embrace the local law, the latter will be held to be modified or repealed thereby." But, as being conclusive, on principle, of the question under consideration, the case of Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891, is directly in point. A general act of this state provides that after its passage aldermen of towns and cities of this state, except in towns and cities of less than 2,000 inhabitants, shall be incompetent to hold any other municipal office during the terms for which they are chosen. In the case just cited the defendant in error resided in Brunswick. He was, in December, 1895, elected an alderman of that city for a term of two years. During his term he was elected mayor. His eligibility to this office was questioned, and he replied that under the terms of the charter of Brunswick, granted prior to the enactment of the general law, he was eligible to be elected mayor while holding the office of alderman. It was said in the opinion in that case that, as the act bears uniformly upon all towns and cities throughout the state which are included and come in the class concerning which the legislation is had, the law was a general one, and that the contention that a special act which declared what persons were eligible to the office of mayor of the city of Brunswick was not modified by the general act was unsound; that it was the legislative act which created the municipal corporation of Brunswick, and prescribed the manner in which the offices of the corporation should be filled. Having done so, it remained in the power of the legislature to change that method at will. And we know of no reason why this cannot be legitimately done by a general statute declaring and fixing the policy of the state in all cities and towns of a certain class. It is not possible that the terms of the general act of 1892 in relation to the abatement of nuisances in the city of Atlanta and the provision of the charter of the city of Atlanta in respect thereto can be construed so as to stand together. The charter confers the power to abate on the mayor and general council and the board of health. The general statute, before it was amended, conferred it on the mayor and aldermen, and there was little difference in the provisions of the general statute and the charter in this regard. The amendatory act of 1892 left the power to abate nuisances in the towns and cities of this state, where the general act of 1833 had placed it, except as to those cities which have a population of 20,000 or more, to which latter class Atlanta belongs; and as to these the power to abate nuisances is vested in the police court. The jurisdiction thus conferred must be exclusive, otherwise the general act would have to be construed as applying to some of the cities of the class named, and not to others. Being a gen-

eral law, it must have general application to all cities coming within the class. That such was the intention of the lawmakers is manifest, not only because it was expressly made general by its terms, but in words it declares that all laws in conflict with its provisions are repealed. It must, therefore, be held as a matter of law that the power to abate nuisances of the kind in question is vested in the recorder's court of the city of Atlanta, and that at the time the board of health undertook to remove the floor of the Union passenger station in Atlanta because it was alleged to be a public nuisance it had no authority to do so; and, inasmuch as it is not only alleged, but shown, that the damages which would have been sustained by plaintiffs in error would have been irreparable in their nature if the removal of the floor was continued, the trespass thus being committed should have been enjoined, and the judgment refusing the application is reversed. All the justices concurring.

CITY OF PADUCAH *v.* ALLEN.

(*Court of Appeals of Kentucky, June 18, 1901.*)

[63 S. W. Rep. 981.]

Constitutional Law—Taking or Destroying Private Property—Nuisance.*—Under Const. § 242, providing that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property injured or destroyed by them," a city is liable for the injury to owners of adjoining property from the location of a pest house.

Same—Same—Same—Measure of Damage.—In the absence of personal injury, the measure of damages, where the establishment of the pest house is permanent, is the impairment of the market value of the property.

Same—Same—Same—Same—Evidence.—Testimony as to the impairment of the value of the property should be confined to witnesses who are acquainted with the property and its market value, or the market value of similar property in the vicinity, and the extent to which such market value has been affected by the establishment of the pest house; the proper inquiry being as to the reasonable market value of the property but for the location of the pest house, and its actual market value with the pest house located and maintained as it is.

Same—Same.—Testimony as to the prices for which adjoining property of the same class and character sold just before and after the location of the pest house is admissible.

Same—Same—Instructions.—Defendant cannot complain of an instruction telling the jury that, in order to find for plaintiff, they must believe there is "a real probable danger" of the smallpox being carried through the air from the pest house to plaintiff's premises.

Same—Same—Same.—The court should have instructed the jury, as requested by plaintiff, that the measure of damage is "whatever amount plaintiff's farm has been depreciated in market or salable value by reason of the defendant's locating of and the maintaining of its pest house, and carrying on the same in proximity to his farm."

GUFFY, J., dissenting.

Appeal from circuit court, McCracken county.

"To be officially reported."

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*See *note* to Mayor, etc., of City of Waycross *et al. v.* Houk, *ante*, p. 421; *notes*, 1 Mun. Corp. Cas. 162; 3 Mun. Corp. Cas. 455.

City of Paducah *v.* Allen

Action by R. M. Allen against the city of Paducah to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Reversed.

R. T. Lightfoot, for appellant.
Greer & Reed, for appellee.

O'REAR, J. In 1897 the city of Paducah, having bought about 20 acres of land about three miles from its corporate limits, located and established a hospital upon it for the purpose of treating eruptive diseases. The property acquired by the city lies on the east side of appellee's farm. The hospital on this tract is about 250 yards from the fence of appellee, and about one-half mile from his residence. After the establishment of this hospital, and after it had been maintained by the city for some two or three years, appellee brought this action to recover of appellant damages sustained to his farm by reason of the location and maintenance of the pest house. The hospital was established principally for the treatment of smallpox patients. It was the claim of the appellee that the locating of this pest house in such close proximity to his farm and to his residence tended to so impair their value—that is, their market value either for selling or renting purposes—as to practically diminish it by half. He asserted that his farm of 325 acres was worth $20,000. The proof introduced on his behalf shows that it was worth from $5,000 to $20,000, in taking a wide range according to the opinion of the various witnesses. The trial resulted in a verdict and judgment for appellee against the city for $2,500 damages.

Various grounds are urged here with much earnestness and force why the judgment should be reversed. We will state and dispose of them in the order of their importance. It is argued on behalf of the city that, inasmuch as it is required by the statute law of the state and by existing conditions to establish and maintain a hospital, which, under the mandate of the statute, it is compelled to establish within not less than one mile of the limits of an incorporated town or city, it cannot be mulcted for having performed this duty, unless it has done so in a negligent or unskillful manner; that, having used care in the establishment of its hospital, it cannot be liable to appellee, unless, in the matter of the managing or conduct of the hospital, it be done negligently, and thereby damages ensue to him. It is contended that the action of establishing and maintaining a pest house or other hospital is a governmental function, which the courts will not interfere with nor control so long as due regard has been had to the law governing its establishment. Prior to the adoption of the present constitution of this state, such may have been the rule with regard to liability of municipalities. However, section 242 of that instrument provides: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by

them; which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction." Concerning this section this court has, in substance, held, and in considering similar sections of state constitutions the United States supreme court has held, that a recovery may be had in cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character by the municipality, although the damage shall not be caused by a trespass or an actual physical invasion of the owner's real estate. City of Ludlow v. Detweller (Ky.) 47 S. W. 881; City of Mt. Sterling v. Jephson (Ky.) 53 S. W. 1046; City of Henderson v. McLain (Ky.) 43 S. W. 700; City of Chicago v. Taylor, 125 U. S. 162, 8 Sup. Ct. 820, 31 L. Ed. 638. This principle, or one quite analogous, is also frequently applied in the case of slaughter houses and similar institutions erected by private individuals or private corporations in such close proximity to another's premises that noxious odors, gases, noises, and other elements tending to so disturb and endanger the lives or health or to discommode the comfort of the occupant of the adjacent premises as to materially depreciate their value and use, and such have been held to be actionable. These actions are generally maintainable upon the theory that the maintenance of the particular institution or business is a nuisance. So it has been held that a pest house erected by a town or municipal or county authorities near the premises of another, injuring the health of his family, or exposing them to a contagious disease, is a nuisance, for which an action will lie. Wood, Nuis. § 68. See, also, Clayton v. City of Henderson (Ky.) 44 S. W. 667. We therefore conclude that, where a city or other municipality erects and maintains a public institution, which, by reason of its nature, endangers the lives or health of the occupants of adjacent premises, as by subjecting them to contagious or infectious diseases, it is not only a nuisance, but it is such an invasion of the property rights of such adjacent holder as amounts both to an injuring and a taking of property, under the section, supra, of our state constitution. For this the city must make compensation.

There was much evidence introduced on the trial as to the extent of the danger to persons on appellee's premises, it being the effort of the city to show that the danger was more imaginary than real, and at best was so remote and improbable as to be practically nil. Many medical witnesses of apparent good standing testified that, while the disease was one both contagious and infectious, under the systems of treatment now in use there was practically no danger of the disease being contracted as much as 30 feet away from the subject when not confined in a close room with it. Indeed, some of them testified that in the open air there was no danger of contracting the disease a distance of from four to six or eight feet, and

practically all of them united in saying that the danger was theoretical or imaginary altogether from a distance of 150 feet. They claim that such is the experience of their profession, and such the opinion of their accepted authorities and writers. On the other side the testimony of many citizens was introduced to the effect that the very fact of the existence of the pest house in such close proximity to appellee's premises had caused alarm and anxiety to all having occasion to visit there or use them, made it difficult to keep servants and workmen employed upon his place, estranged his friends and visitors from his place, and made the property so undesirable in the public estimation as to materially decrease its vendable or market value. And right here we may say is the storm center of appellant's objections and contentions upon this appeal. It is its insistence that the establishing and maintenance of a pest house in such proximity to other persons' property is not per se a nuisance; that damages should not be allowed for any injury unless it be shown to be actual and real; and that injury, it is argued, should be, not the public's estimate of the situation, but the real danger to which appellee and those occupying his premises were subjected because of the location and treatment of the diseased patients at the pest house. We have stated above that the location of this pest house at the point and under the circumstances indicated was such an invasion of the property rights of the adjoining owner as to entitle him to recover for damages sustained. Now, what is the damage that he has sustained? Is it alone that he and the members of the family are subjected to an actual danger of contracting a loathsome and dangerous disease? Or is it the annoyance and loss that he may sustain by reason of being deprived of a portion of his premises, or the use thereof, because by reason of its close proximity to the pest house his servants will not, and cannot in safety, cultivate it to the line? Or, is it the diminution of the salable value of his property in so far as that value has been affected? So far as the facts in this case are concerned, it may be stated that there is no claim that the disease has actually been contracted by any member of appellee's family, and therefore we do not feel called upon to determine to what extent such a fact, had it existed, would have been actionable against the city. If it be a fact, or be shown, that the establishment of the pest house is permanent, it is the market value—that is, the selling and renting value of the owner's premises—that must be the measure of his damages. They are as much his property as is the right to peaceably possess and personally enjoy it. It is generally this market value that is the criterion in measuring damages when property has been injured that is adopted by the courts for lack of a more uniform, certain, and satisfactory one. Therefore, to the extent that this market value has been impaired by the establishment of appellant's pest house at the point in con-

troversy, appellee ought to be reimbursed by the city. It is well known and universally recognized that smallpox is a very contagious, as well as a most loathsome and dangerous, disease; that its presence, though beyond the point where an expert would determine was that of actual danger, is a fact that naturally and almost universally excites alarm, uneasiness, and repulsion. All avoid its neighborhood. Therefore lands located in very close proximity to a place where this disease is rightfully, and at all and any times liable to be, treated, and from which proximity the disease is liable to infect the adjoining premises, creates in the mind of the public an aversion to that immediate locality. It necessarily results in the impairment of the value of the property within the affected district. It was proper, therefore, to submit the question to the jury to what extent appellee's property had been diminished in its market value by reason of the location and maintenance of this pest house, in connection with the question of probability of those upon appellee's premises becoming infected with the disease because of such enforced proximity to it.

In the course of the introduction of the evidence (and there was much of it of the character described without going into it in detail) many witnesses were allowed to testify for appellee without showing themselves to be qualified by a sufficient acquaintance with the property, or with the market value of that or similar property, to be able to testify thereof. They, however, were permitted to state to the jury that, in their opinion, the value of the property was diminished one-half. Some used the expression, "It would be worth nothing to me." All of this class of evidence should have been excluded, and appellee should have been confined to the testimony of such witnesses who showed that they were acquainted with the property, its value, or the value of similar properties in the same vicinity and their market values, and with the fact to what extent these market values had been affected by the location of the pest house. The proper question would be: What was or would be a reasonable market value of the premises in question but for the location of the pest house, and what was its actual market value with the pest house located and maintained as it was? We are of the opinion that to the extent that the evidence of the class above criticised was admitted (and it was of a material quantity, in our opinion) it was error in the court. On the trial appellant offered to prove by various witnesses what adjoining properties of the same class and character had been sold for just before and since the location of the pest house, it being thus attempted to prove that the market value of this property had not been impaired to the extent indicated by the opinions of appellee's witnesses. Of course, market value is the price at which an article sells in the market. This price is fixed by sales actually consummated. Such sales, when made under normal

and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses; for, truly, here is where "money talks." Thus, in Suth. Dam. 799, it is said: "Evidence of actual sales of other similar property to that in question may be shown. It is competent to prove the value of other like property by which the property in question may be compared. It was held in an Illinois case, in an action to recover damages for the breach of a contract to convey land, that the plaintiff, in order to show the value of the premises in controversy, might prove, not only the worth of other adjacent property at or near the date of such contract, but even the value of land of a different quality, lying in the immediate vicinity, leaving it to the jury to determine the difference in value." We are of the opinion that it was error in the trial court to reject the testimony above mentioned.

The court gave the jury the following instructions: "Instruction No. 1. The court instructs the jury that the law of this state made it the duty of the city of Paducah to locate and build a suitable smallpox pest house in McCracken county, not nearer the city limits, however, than one mile. And the court further says to the jury said city had the legal right to locate, build, and carry on the small-pox pest house for the care of smallpox patients at the place described and complained of in plaintiff's petition. Yet, while this is true, if the jury shall further believe from the evidence that by reason of the proximity of said pest house to the tract of 325 acres of plaintiff's land, where he lives, the same has been injured in value, the law entitles him to recover in this action damages commensurate with such injury, sufficient to compensate him therefor, according to further instructions herein. Instruction No. 2. The court further instructs the jury that if you shall believe, from the evidence in this case, that by reason of the nearness of said pest house to the said land of the plaintiff, or any portion thereof, there is real probable danger of the smallpox being communicated through the atmosphere from said pest house to and upon a portion or all of plaintiff's land, so as to really cause any persons thereon to take the smallpox, or really placing them in danger of taking it, and that by reason of such jeopardy the value of plaintiff's land is thereby lessened to the extent of a part of the whole of the tract, you will find for the plaintiff such sum in damages as you may believe from the evidence such portion or all of the tract has been so damaged or lessened in value by such proximity of said pest house, not exceeding the sum claimed in plaintiff's petition. Instruction No. 3. But the court further instructs the jury that unless you shall believe, from the evidence in this case, that there is a real probable danger of the smallpox being carried through the air from said pest house to and upon said land of the plaintiff, and persons thereon becoming infected therewith and taking the smallpox, then, and in such case, there is no legal cause of action against the defend-

ant in this case; and you find for the defendant, although you may believe from the evidence many persons other than the plaintiff are alarmed and express their fears of the smallpox anyhow. The meaning of this instruction is that you should not find for the plaintiff unless you shall believe from the evidence there is real probable danger that the air or the wind from the pest house will blow the smallpox onto and give it to people on Allen's said land. Instruction No. 4. The court further instructs the jury that, although you may believe from the evidence that there is a real probable danger of the smallpox being blown from the pest house onto and infecting persons on plaintiff's land nearest the pest house, yet if you shall fail to believe from the evidence there is any real danger of its being blown upon the still more remote portion of the tract, you will not consider such remote portion of the tract in making up a verdict for compensatory damages." The appellant criticises the statement in the instructions "that there must have been a real probable danger of the smallpox being communicated through the atmosphere from said pest house and upon a portion of the plaintiff's land," etc. The court evidently intended by the term "real probable danger" to say that the probable danger must be an actual fact, as distinct from one solely imaginary or apprehended. Upon the whole, we think the instructions, except as to measure of damages, are as favorable to appellant as it was entitled to.

It will be observed that the court failed to give to the jury a criterion or measure of damages in his instructions. An instruction on this point was offered by appellee as follows: "Instruction No. B. The court instructs the jury that, if they should find for the plaintiff, then that the criterion or measure of damage is whatever amount plaintiff's farm has been depreciated in market or salable value by reason of the defendant's locating of and the maintaining of its pest house and carrying on the same in proximity to his farm." This instruction was objected to by appellant, and was refused by the court. We think it fairly embodies the law in this case applicable to this subject, and should have been given.

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

GUFFY, J. (dissenting). The instructions given are more favorable to defendant than it was entitled to. If the establishment of the pest house has caused a decrease in the value of the land, and that without regard to the fact whether or not there was real danger of persons taking the smallpox by reason of the establishment of the pest house, I do not think that the court erred to the prejudice of defendant as to the admission of the testimony. I think the judgment should be affirmed.

TOWNSEND *et al. v.* EPSTEIN.

(Court of Appeals of Maryland, June 13, 1901.)

[49 Atl. Rep. 629.]

Nuisance—Overhead Structure Connecting Properties on Opposite Side of Street—Easement of Light and Air.*—A structure connecting two buildings on opposite sides of a street, built so far above the street as not to interfere with traffic thereon, is a nuisance as to adjacent property owners, whose light it obstructs.

Public Nuisance—Special Injury to Private Persons.—Where plaintiffs owned a building abutting on a street, so that a structure erected by defendant to connect his buildings on opposite sides of the street, though not interfering with travel, so obstructed the light from the street as to make it necessary for plaintiffs to use artificial light in conducting their business, they sustained an injury different from that suffered by the public, so that they were entitled to maintain injunction to compel defendant to remove the passageway.

Streets—Right of Mayor and Council to Authorize Their Use for Private Purpose.—The mayor and city council of a city hold the streets in trust for the benefit of the public, and have no right to authorize their use for a private purpose.

Same—Private Purpose, What Is.—Where defendant owned stores on opposite sides of a street, and constructed a passageway over the street for the convenience of his help and customers in passing from one store to the other, such use of the street was for a private, and not a public, purpose, and an ordinance authorizing the construction of such passageway was invalid.

Same—Nuisance—Injunction.—Where defendant had constructed a passageway over a street so as to shut out the light from plaintiffs' premises, the nuisance was a continuing one, so that plaintiffs' remedy at law could only have been by a succession of suits for damages not affording adequate redress, and they were entitled to relief by injunction.

Same—Same—Same—Estoppel.—Where defendant constructed a passageway over a street so as to shut out the light from plaintiffs' premises, and thereby become a nuisance, plaintiffs' failure to object to the passage of an ordinance authorizing the construction of such passageway did not estop them from afterwards maintaining injunction to compel its removal.

Same—Same—Same—Same.—Where defendant erected a passageway across a street so as to obstruct the light from plaintiffs' premises, the fact that plaintiffs did not object until the structure was completed did not estop them from maintaining injunction to compel its removal.

Appeal from circuit court of Baltimore city; Henry Stockbridge, Judge.

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*See Adams *v.* Chicago, Burlington, etc., R. Co., 1 L. R. A. 493, and *note*; City of Pueblo *v.* Strait, 24 L. R. A. 392; Field *et al. v.* Barling *et al.*, 149 Ill. 556, 24 L. R. A. 406; Block *et al. v.* Salt Lake Rapid Transit Co., 9 Utah 31, 24 L. R. A. 610; Willamette Iron Works *v.* Oregon Ry. & Navigation Co., 26 Ore. 224, 29 L. R. A. 88; Dill *v.* Board of Education of the City of Camden (N. J.), 10 L. R. A. 276, and *note*; Selden *v.* City of Jacksonville (Fla.), 14 L. R. A. 370, and *note*; Egerer *v.* New York Cent. & H. R. R. Co., 14 L. R. A. 381, and *note*; Irvine *v.* McCreary (Ky.), 49 L. R. A. 417; Western Ry. of Alabama *v.* Alabama Grand Trunk Ry., 17 L. R. A. 474, and *note*; Jones *v.* Erie & Wyoming Valley R. Co. (Pa.), 17 L. R. A. 758; Spencer *v.* Metropolitan Street R. Co. (Mo.), 22 L. R. A. 668; Barrows *v.* City of Sycamore, 150 Ill. 588, 25 L. R. A. 535. But see Home Building, etc., Co. *v.* City of Roanoke (Va.), 27 L. R. A. 551; Willis *v.* City of Winona (Minn.), 26 L. R. A. 142.

Townsend *v.* Epstein

Suit by Townsend, Grace & Co. against Jacob Epstein. From a decree in favor of defendant, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

Luther M. Reynolds, George R. Willis, and Joseph C. France, for appellants.

Wm. Pinkney Whyte, Isaac Lobe Straus, and Louis E. Rosenbaum, for appellee.

JONES, J. This case presents questions of more than usual interest and importance, but we think principles enunciated in comparatively recent decisions of this court must so far control its decision as to render the solution of these questions free from difficulty. The facts giving rise to this litigation are as follows: The appellants (who were plaintiffs below) are the owners in fee of a lot of ground fronting about 49 feet on the south side of Fayette street, in the city of Baltimore, and running southerly, with uneven width, back to and abutting about 68 feet on a small street known as "Garrett Street," which runs east and west parallel with Fayette street to the north of it, and with Baltimore street to the south of it. This lot is occupied by a large building extending from street to street, which is used by the appellants as a factory for the manufacture of straw goods. In this building, looking out upon Garrett street, are a number of windows for the admission of light to the different floors thereof. The appellee is the lessee and occupant of three parcels of ground with the buildings thereon fronting on the north side of Baltimore street, and extending northerly to Garrett street, and is conducting upon these premises a large merchandising business. For the purposes of this business he has recently purchased a lot of ground lying between and abutting on Fayette and Garrett streets, fronting on the south side of the former, and extending back to the north side of the latter street, and situated immediately opposite to where his premises lying between Baltimore and Garrett streets abut on the latter street, and to the west of the premises of the appellants. Upon this lot he proposes to erect a six-story warehouse, and to establish communication between that and the premises and buildings occupied by him on Baltimore street by a tunnel under and a structure above and across Garrett street. The tunnel has been constructed. The structure across Garrett street has also been nearly completed. This is an inclosed structure, about 33 feet to the west of the premises of the appellants, and is about 17 feet above the surface of the street. It is now connected with the building of the appellee which fronts on Baltimore street and extends back to the south side of Garrett street; is 30 feet in width, running with the latter street; and is built 3½ stories high across it to where this structure is intended to be connected

on its north side with the warehouse which the appellee proposes to there erect. Before proceeding to construct this tunnel or to erect this connecting structure, the appellee applied for and procured from the mayor and city council of Baltimore, after complying with all formal requirements, the passage of an ordinance purporting to grant to him the privilege and right, under regulations therein prescribed, to construct such tunnel under Garrett street, and to erect an inclosed superstructure across said street to "connect one or more floors of the premises of Jacob Epstein on West Baltimore street * * * with the corresponding floor or floors of the building or improvements to be erected by him on the south side of West Fayette street and the north side of West Garrett street." This ordinance recited that this right was granted "for the convenience of the public having business with Jacob Epstein." The appellants began this suit by filing a bill in equity charging, in substance, that this ordinance, in attempting to grant to the appellee the right to build a tunnel under and a structure over Garrett street, as therein provided, is invalid and void, and that the attempt made by the appellee to exercise such right is an invasion of their rights as abutting lot owners on said street. They pray that the said ordinance shall be declared invalid and inoperative, and that the appellee be perpetually enjoined from digging the tunnel and from erecting the superstructure as proposed, and that he be required to restore the earth removed from the tunnel, and to take down and remove such part of said superstructure as had already been erected. The trial court refused the relief prayed for by the appellants, and decreed that their bill be dismissed.

Garrett street is a public street of the city of Baltimore, and as such subject to the same control of the municipality as it has over all of its streets and highways. The rights of the parties to this controversy are, therefore, to be determined from their relation to this street as a public street or highway of the city. This being now fully conceded, and, if not conceded, being incontrovertibly shown, we need not undertake to trace the history of this street with a view to defining its status as involved in the present contention. The appellants, in their bill, based their claim to relief upon a different theory as to this status, which, in the brief of their counsel, is practically abandoned, and, in view of the proofs in the case, properly so, as their rights depend upon the conditions actually existing. Besides this, the appellants and appellee, as lot holders abutting on this street, claim under the same source of title, and to this same source is due the dedication of the street in question, among others, as a highway, to "be so deemed and taken to all intents and purposes whatever." It would seem, therefore, that the appellants, as against the appellee, can claim no greater rights in or over this street than such as belong to both parties as abutting owners upon this

highway. The question, therefore, is, do these rights entitle the appellants to the relief prayed for in their bill against the acts of the appellee in respect to the street in question which are therein complained of? In determining this we are to inquire, what are the rights of the appellants? Have they been injured in respect to those rights in such manner as to entitle them to a remedy against the appellee? If so, are they entitled to the particular remedy which they have sought in this proceeding? That owners of lots or ground abutting upon the public streets have rights in the easement which are valuable, and are in addition to those which they have in common with the general public, is recognized in our statute law, which confers upon the city of Baltimore the power for laying out and closing up streets by providing for compensation to such owners upon the closing of an adjacent street (Act 1898, c. 123, § 6, subtit. "Streets, Bridges and Highways"), the same provision being formerly contained in Code, art. 4, § 806, Pub. Loc. Laws. Such right of the abutting owner thus recognized was enforced by this court in the case of Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403, where it was said: "It is recognized by the statute that abutting owners have interests in the street or alley which are valuable, and that these cannot be taken for the public use without compensation. It is believed that no one will contend that they can be taken for private use on any terms whatsoever. Certainly such a doctrine has never at any time found any toleration in this state." In the case just referred to, relief was sought against the obstruction of the public alley there in question, so as to cut off the complaining lot holders from ingress and egress from and to another public street, and to destroy the right of passage out and over said alley to this street. The obstruction of the alley was attempted by proceedings under the authority of an ordinance of the mayor and city council of Baltimore providing for the closing of the alley. This court held that the use for which the alley was authorized to be closed was not a public, but a private, use, and that, therefore, the ordinance authorizing the closing of it was void upon the ground, as appears from the quotation just made, that the abutting lot holders who were there seeking relief had valuable rights in the easement of the alley, and could not be deprived, against their consent, of these rights for any but a public purpose, and then only with compensation. Now, this valuable property right in the public street which this court upheld in the case just referred to embraces something more than the mere right of passage over the surface of the street, which was the right more directly involved in that case. The abutting lot holder has the right to the enjoyment of the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy, the comfort, enjoyment, or use to be derived from the easement to which he is entitled;

and we find this recognized by very high authority. In 2 Dill. Mun. Corp. (4th Ed.) § 712, it is said: "There is a large class of cases in which no recovery can be had for mere consequential injuries to adjacent property from the construction of public improvements in the streets, towns, and cities; the lot owner holding subject to the right of the public to use the streets for any purpose consistent with the legitimate uses for which they were dedicated or acquired. But lot owners have a peculiar interest in the adjacent street, viz. easements of access, light, and air, which are property rights, and as such are as inviolable as the property in the lots themselves; and they may recover from the company making such improvements such damages as they may sustain by injuries to or invasions of such easements." Again, in the case of Field v. Barling (Ill.) 37 N. E. 850, 24 L. R. A. 406-409, the court said: "It will not be necessary to cite authorities in support of the proposition that a private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use. * * * The dedication of the strip of land for a public street embraced not only the surface of the ground, but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil." The case just cited is peculiarly apt here, because it deals with facts and conditions very similar to those presented by the case at bar. We may also refer to the case of Barnett v. Johnson, 15 N. J. Eq. 481, 487, 488, in which the court discusses the question whether the Morris Canal was a public highway, which being determined affirmatively, the court, in the course of discussing the further question as to the rights of an abutting property owner in respect to light and air from this highway, says: "There are * * * two classes of rights originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect, and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air." And again, in the course of the opinion, occurs this emphatic language: "Where a strip of land is declared a public highway, the adjoining owner has a right to light and air from it. The column of light and air above the roadbed, whether of land or water, is as much a part of the highway as the roadbed itself." It is thus seen that the right of the abutting owner to light and air from a public highway as part and parcel of the easement is distinctly recognized in the authorities when such right has been drawn in question, and it rests upon sound and obvious reason. Recognition of this right is not at all at variance with the decisions of this and other courts of this country in regard to

the doctrine of ancient lights, which hold that such doctrine is unsuited to conditions here. The case of Cherry v. Stein, 11 Md. 1, cited and relied upon by the counsel for the appellee, is an illustration of these cases. The doctrine of ancient lights, that they repudiate, involves an abridgment of the use which an owner can make of his own property. It puts upon the property of one a servitude in favor of another. This is not the nature of the right to light and air from a highway, which belongs to an abutting owner as part of the easement. This right to light and air is the distinct right of every abutting owner; and in claiming protection for it such owner is not imposing a servitude upon his neighbor's property for his benefit, but is only asserting his equal right with his neighbor to the enjoyment of an easement common to them both. Nor is there anything, as counsel for appellee insist, in the case of Garrett v. Janes, 65 Md. 260, 3 Atl. 597, in denial of the right we are here considering. The structure complained of in that case as interfering with the light and air from the street was erected under the authority of an act of assembly and an ordinance in pursuance thereof, which extended and secured to all persons alike who resided within the limits designated in the ordinance the right to erect, under regulations prescribed, "steps, porticos, or porches, or other architectural ornaments to houses fronting on Mount Vernon Place." This was a privilege in the interest of the general public, and tending to the general comfort and enjoyment of the homes in the district to which the ordinance applied. The court found that the structure complained of was one of a kind which the ordinance authorized, and was, therefore, a lawful structure, and refused to have it abated as a nuisance, which it was claimed to be.

We have seen, now, the nature and extent of the rights of the appellants in and to the street of the obstruction of which they complain. If the public easement has been improperly and unlawfully obstructed by the appellee, then he has been guilty of creating a nuisance; and, if the appellants have suffered therefrom an injury different in kind from and beyond that suffered by the community generally, or special and particular damage resulting to them by reason of the nuisance, then they have a right to their private remedy for such injury. Garitee v. Mayor, etc., 53 Md. 422; Field v. Barling, supra. To discover what injury, if any, the appellants have suffered from the acts of the appellee, and the character of the injury, resort must be had to the proof. This does not show that the appellants have suffered or are suffering any injury from the tunnel constructed under the bed of the street in question as has been described. In reference to the superstructure, the proof shows that it tends to and does diminish and obstruct the light from the street to the premises of the appellants. There was evidence upon the part of the appellee tending to contradict this, but the decided pre-

ponderance of testimony is with the appellants upon this point. The nonexpert witnesses testifying on their behalf testified from the actual observation of the conditions in respect to light, made upon the premises of the appellants, where these premises were affected in this particular by the superstructure; while those testifying on behalf of the appellee made their observations from other points, and their evidence was more, therefore, the expression of opinions formed upon inferences drawn than a statement of actual facts. Expert testimony was offered on the part of the appellee with a view and tending to show that the superstructure in question could not hinder, but rather tended to improve, the light to the premises of the appellants. This was opposed by expert testimony upon behalf of the appellants, which was much more satisfactory, and much more consistent with common sense and common observation, to the effect that such a superstructure as the one in question, and so located with respect to appellants' premises, necessarily tended to obstruct the access of light to, and to diminish it in, said premises. It appears, therefore, that the appellants have suffered injury from the erection of the superstructure complained of. It further appears that this injury is one different in kind and degree from, and in addition to, such injury as the general public suffer by reason of the obstruction. This results from the situation of the premises of the appellants with respect to the observation, and the nature of the use of these premises, and the construction of the part thereof abutting on Garrett street. The proof shows that in the part thus abutting there are many windows, as to some of which, in the lower floors of the building, there is an entire dependence for light upon Garrett street. The premises are used for manufacturing purposes, for which a proper supply of light is more of a necessity than a mere matter of comfort or convenience. It is further shown that, owing to the diminution of light resulting from the obstruction in question, the appellants have been compelled to resort to an increased supply of artificial light for the purposes of their business. These considerations would seem to make a distinct difference between the injury to the appellants caused by the obstruction of which they complain as a nuisance and that suffered by the general public.

It is contended on behalf of the appellee, however, that, though there may result injury and inconvenience to the appellants from the erection and maintenance of the structure in question, the appellants have no cause of action, and are without remedy, because the structure is a lawful one, in that it was authorized by the ordinance of the mayor and city council, which has already been referred to. The corporation, the mayor and city council of Baltimore, is invested with the title to and control over the public streets. This control, however, is not an arbitrary control. The streets and high-

ways are held in trust for the benefit, use, and convenience of the general public. There are many ways in which the power to control and regulate the use of the streets can be and must be exerted by the municipality to meet the necessities and the convenience of an urban population, but the exertion of this power must have for its object a public purpose. It is not in accord with the trust upon which the municipality holds the streets, nor with the nature of the control which it has over them, to make use of the power and authority with which it is invested in that regard to promote a mere private purpose, to subserve a mere private interest, or to subordinate the right of one citizen in the streets or in a street of the city to the private interest and convenience of any other. In the case of Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403, supra, this court held that this could not be done even if compensation were made, and though done under the guise of serving a public purpose. A fortiori, it cannot be done without compensation. We are confronted here with the same inquiry that the court was called upon to make in the case last cited: Was the ordinance under which the appellee here undertakes to justify the acts complained of passed to subserve a public purpose, or does it serve a mere private purpose and private and individual interests? Upon the face of it, it seems to recognize the limitations upon the right and power of the municipality to pass ordinances of this nature by expressing its object to be "for the convenience of the public having business with Jacob Epstein." This is a rather thin disguise. It is but another form of saying "to promote the private business of Jacob Epstein and his convenience in respect thereto." How does it serve the general public, or a public purpose, to facilitate Jacob Epstein, at the expense of his neighbors, in attracting customers to, and serving them at, his store? Aside from this, the proof makes it perfectly clear that only private interests are to be subserved by the privileges obtained under the ordinance in question. The appellee, in his testimony, says "that he intends to use this superstructure, after his Fayette street building is completed, as a means of egress and ingress from the Baltimore street premises to his Fayette street premises, for his customers and his help on the floor"; "that, if anybody wants to go through there, to use it as a way to go between Baltimore and Fayette streets, he would not object, but that he does not intend it for a public thoroughfare." This only condenses what sufficiently appears otherwise, and evidences the absolutely private purpose for which the structure is to exist, and the private control that it is to be under. If the municipality can grant a privilege of the character of the one here in controversy, it implies a power to practically destroy a street as an open, light, and comfortable highway, and its use for the purposes of residence or business by the abutting owners in total disregard of the rights of such owners. If the privilege

be granted to one, it cannot be denied to others who may apply for it in like circumstances; and the grant of such privilege might go to the extent of practically transforming any part of a street from an open highway affording unobstructed passage, light, and air into a covered and darkened way. The exercise of such a power as was attempted in the ordinance to which reference has been had cannot receive the sanction of this court. The ordinance, for the reasons assigned, is an invalid act, and affords to the appellee no bar to the legal redress to which the appellants are entitled for the injury caused to them by the acts of which they here complain.

It remains now to inquire whether the appellants are entitled to the particular remedy which they have invoked in this case. It is contended by counsel on behalf of the appellee that this legal redress, if the appellants be entitled to any, can only be by way of a suit or suits at law for consequential damages, caused by acts of the appellee, which they seek to make the grounds of action. They here invoke a principle that is illustrated and applied in a class of cases of which the case of Garrett v. Railway Co., 79 Md. 277, 29 Atl. 830, is an example. That principle is applied, however, in cases where the public street is put to some additional lawful use, a use not inconsistent with its use as a highway, and a use intended to further serve the public interest and convenience. In such cases the injured property owner cannot prevent the lawful use to which the street is put, but can only recover damages for any consequent injury. This principle is not applicable, however, to a case, such as we find this to be, where the injury complained of results from an unlawful and unauthorized use of the street. In such a case there is no reason why the injured party should not have such remedy as may give suitable redress. In this case the appellee is unlawfully obstructing a public street as respects its character as an open highway, and the light and air which, as such a highway, it affords. The appellants have shown, as we have seen, that they are injured by the obstruction in such way as to entitle them to redress. The obstruction is a continuing one, operating to them annoyance, inconvenience, and pecuniary loss from day to day. Though they would be entitled to recover damages at law for the injury and loss to which they are subjected, they could not recover for the whole damage, past and prospective, in one suit, but only for damages to the time of suit brought. These damages would be difficult to estimate, and in any one case would be comparatively trivial. In seeking redress at law, therefore, they would be driven to a multiplicity of vexatious and unprofitable suits and continuous litigation. To tell them that this is the only redress they can have, would be to say that all the law can do for them is to aggravate the nuisance from which they are already suffering. "To suppress oppressive and vexatious litigations" is one of the grounds of equity jurisdiction in regard to public

nuisances. 2 Story, Eq. Jur. § 924; Amelung v. Seekamp, 9 Gill & J. 474. Elliott, Roads & S., at page 497, speaking of the phrase "irreparable injury," says: "It does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one." In the present case, to seek redress at law would, for the reasons given, prove vexatious and oppressive to the appellants, and it is entirely apparent from the circumstances of the case that no adequate redress can there be afforded them. They have properly sought redress by injunction to have the nuisance they complain of abated, and its future continuance prevented.

The further contention on behalf of the appellee is that the appellants are estopped from maintaining their present suit because of acquiescence on their part in the erection of the structure now complained of, or of laches in not sooner making known their objection to the same. This contention is based on the grounds: (1) That there is evidence that Mr. Townsend, one of the appellants, when consulted by the appellee in regard to his plans, which included the construction of the tunnel under and the structure across Garrett street, gave his assent to the same, and even encouraged the appellee to carry them forward; (2) that, pending the proceedings for procuring the ordinance to authorize the carrying out of the plans of the appellee, the appellants did not appear to make any objection, or offer any suggestion, as to the same; (3) they stood by, and saw the tunnel completed, and the superstructure nearly so, before making known the objections they now urge. In regard to the first of these grounds, it may be sufficient to say that the evidence fails to clearly establish it. The appellee testified on his own behalf, to the purport which has been indicated, as to what was said by Mr. Townsend when the appellee sought him in reference to his plans, etc. Mr. Townsend, however, denies that the conversation was as detailed by the appellee, and gives quite a different version of it. Besides this, Mr. Townsend is only one of the appellants, and, if the conversation occurred between him and the appellee as the appellee states, there is no evidence that he communicated it to his co-appellants, and co-owners with him of the abutting property which they occupied, and we may at least express a doubt whether an express acquiescence on his part in the plans of the appellee would bind his partners as respects the interests they had in the property. As to the second, it is not perceived how the failure to object to an ordinance which we find to be invalid and inoperative could give to the ordinance validity or effect, or authorize an act which, with or without the ordinance, was un-

lawful, and a public nuisance. As to the third ground, the appellants could not complain of injury to themselves until it was ascertained that injury would result to them from the acts of the appellee. They seem to have been prompt to act when that discovery was made. Until then they had only the right to object as members of the public, and their failure to object in that capacity could not render a public nuisance lawful. What has been said as to the title of the appellants to relief does not apply to the tunnel, since they have shown no injury resulting to them from the construction or maintenance of that.

From the foregoing views it follows that the decree of the court below must be reversed, and the cause remanded, that a decree may be passed in accordance therewith. Decree reversed, with costs to the appellants, and cause remanded.

OSTROM *v.* CITY OF SAN ANTONIO.

(*Supreme Court of Texas, May 16, 1901.*)

[62 S. W. Rep. 909.]

Disposal of Garbage*—Trespass upon Private Property—Evidence Sufficient to Prove Knowledge on Part of City.—Plaintiff claimed title to lots in the defendant city which were used by the defendant as a highway over which the garbage of the city was hauled to the dumping grounds. In a suit to determine the question, the title was adjudged to be in plaintiff, and the defendant was prohibited from such use of the property, but continued in the use. Plaintiff built a fence to prevent the use of the lots as a highway, which fence had been torn down by the defendant's servants, and plaintiff arrested for constructing the same. The superintendent of street cleaning, when asked by the employees how they should get to the dumping grounds, told them to "get there the best way they could." *Held*, sufficient to show that the trespass had been committed with the knowledge of the city.

Disposal of Garbage Not the Exercise of a Governmental Function.—The cleaning of city streets and disposal of such garbage is not the performance of a duty primarily resting on the state, but is the exercise of a corporate power, as distinguished from a governmental function, for the abuse of which a city is liable.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Sarah F. Ostrom against the city of San Antonio. From a judgment of the court of civil appeals (60 S. W. 591) affirming a judgment in favor of defendant, plaintiff appeals. Reversed.

Edward Ostrom and James Routledge, for plaintiff in error. Geo. C. Altgelt, for defendant in error.

BROWN, J. Sarah F. Ostrom sued the city of San Antonio in the court of the Thirty-Seventh district, alleging, in substance, that in that court, on the 24th day of November, 1897, she recovered a judgment against the city which established

*See *notes*, 1 Mun. Corp. Cas. 163; 3 Mun. Corp. Cas. 455.

her title to all of lots 12 and 13, district 1, range 3, of the said city, and that the said court entered up a judgment enjoining and prohibiting the city of San Antonio from thereafter using any part of the said lots as a public highway, road, or street; that from and after the day the said decree was entered to the time of filing the suit, on the 23d day of November, 1899, the city of San Antonio continued, in defiance of the said decree, and against the protests of the plaintiff, to use the said lots as a highway for its carts hauling the garbage of the said city. She alleged her damages at the sum of $5,000. The city pleaded a general denial. The case was tried before the judge without a jury, and judgment was entered that the plaintiff take nothing by her suit. A statement of facts was filed by the judge, but no conclusions of fact or law are contained in the record. The court of civil appeals affirmed the judgment of the district court on the following grounds: "(1) There was no proof that the city directed or authorized the use alleged of this road as a route for wagons and carts used by its employees for carrying the garbage of the city to the dumping grounds. (2) The service which the city undertakes to render in removing garbage is not one undertaken for special advantage or profit to the city, nor an act of strictly corporate concern. It is a service performed in the interest of the public at large."

The undisputed evidence shows that the city had, prior to the entry of judgment in the first suit, claimed the right to use this property as a roadway or street for hauling garbage with the same class of carts and employees, which contention was decided against the city, and, after the city had been enjoined, the use of the land by the carts and employees of the city for the same purpose was continued without intermission, against the protests and over the objections of the plaintiff; that a fence was placed across the roadway, so as to prevent the entry upon this land, which was torn down by the foreman of the carting gang, and the use was continued as before; that, when the passage over the land was obstructed by the plaintiff, the police of the city arrested her for so doing. The superintendent of this class of work for the city testified that the men who were doing the hauling came to him to know how they would get to the dumping ground, and he did not direct them to go over the plaintiff's ground, but told them "to get there the best way they could."

The persons who trespassed upon the plaintiff's land were in the employ of the city, and, if engaged in the discharge of work for which the city would be responsible, whether its officers directed it would be immaterial; and, if the work being done was of the class for which the city was not liable, direction by officers would not make it liable. The evidence in this case shows, without dispute, that the superintendent of the work knew that the employees of the city were using plaintiff's land, and he did not attempt to prevent it. Any

one who reads the facts must conclude that the men engaged in the trespass would, under the directions given, understand that they were not forbidden to pursue the same course as before. The facts show an oppressive treatment of the plaintiff by the city's employees, and a disregard of her rights, as well as a violation of the decree of the district court; and, unless the city was exempt by law from liability for the acts of its employees, the district judge should have entered judgment in favor of the plaintiff for such damages as the testimony established in her favor, which could not have been less than nominal damages and the costs of the suit. The rules of law which must govern in determining the rights of the parties in this case are clearly stated by Chief Justice Gaines in White v. City of San Antonio (Tex. Sup.) 60 S. W. 426, as follows: "A municipal corporation proper—a city, for example—acts in a two-fold capacity. Certain functions are conferred upon it in the interest of the public at large, and certain others for the peculiar advantage of its own inhabitants. For the unlawful acts of its officers in performing functions of the former class, the corporation is held, as a rule, not to be responsible; but for their torts in discharging duties of a purely corporate character the corporation is liable." Id., 60 S. W. 426, Tex. Ct. Rep. p. 418. The question for us to determine is, to which of the two classes of powers expressed in the foregoing citation does the act performed in cleaning the streets of San Antonio belong? In the case of City of Galveston v. Posnainsky, 62 Tex. 127, Judge Stayton, for the court, said: "It would seem that in so far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws made to enforce the general policy of the state,—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given; that in reference to such matters they should stand as does sovereignty, whose agents they are,—subject to be sued only when the state, by statute, declares they may be. * * * In so far however, as they exercise powers not of this character, voluntarily assumed,—powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for a purpose essentially private would be liable." In what sense can it be said that the cleaning of the streets of San Antonio was a duty that primarily rested upon the state of Texas? We know of no principle of law upon which such duty can be based, nor any case which has so held, nor any instance in which such power has been exercised by the state for the benefit of the general public; and we must conclude

that it does not fall within that class of cases which are specified as being powers to be exercised for the good of the general public, imposed upon a municipal corporation for enforcement within its limits. The law imposed the duty of cleaning the streets upon the city of San Antonio, within its own limits, primarily and especially for the benefit of its own people. It is strictly a corporate function, for the abuse of which by its agents in the course of their regular employment the city must be held liable. Lloyd v. Mayor, etc., 5 N. Y. 375, 55 Am. Dec. 347; Quill v. Mayor, etc. (Sup.) 55 N. Y. Supp. 889; Missano v. Mayor, etc. (N. Y. App.) 54 N. E. 744; Barney Dumping-Boat Co. v. Mayor, etc. (C. C.) 40 Fed. 50; Engle v. Mayor, etc. (C. C.) 40 Fed. 51; City of Ft. Worth v. Crawford, 64 Tex. 202; 15 Am. & Eng. Enc. Law, p. 114. We can see no difference upon the question of liability between this case and City of Ft. Worth v. Crawford. If the disposition of garbage, dead animals, and the like, in that case, had been considered a function of the state government, exercised by officers of the municipal corporation, the court could not have held the city liable for the consequences; and the judgment of this court that the city was liable for the nuisance includes the proposition that the acts were done in execution of a corporate power, as distinguished from a governmental function. The following cases hold a contrary doctrine: Condict v. City of Jersey City, 46 N. J. Law, 160; Love v. City of Atlanta, 95 Ga. 132, 22 S. E. 29; Connelly v. City of Nashville (Tenn. Sup.) 46 S. W. 565; Kuehn v. City of Milwaukee (Wis.) 65 N. W. 1030.

This court has no power to ascertain the damages to which the plaintiff is entitled under the testimony, and therefore cannot enter the judgment that the judge of the district court should have entered, because it is necessary that other facts shall be found; and we therefore reversed the judgment of the district court and of the court of civil appeals, and remand this case to the district court for further trial.

CUNNINGHAM *v.* CITY OF THIEF RIVER FALLS *et al.*

(Supreme Court of Minnesota, June 21, 1901.)

[86 N. W. Rep. 763.]

Defective Street—Railroad in Street—Personal Injuries—When Verdict Supported by Evidence.—Plaintiff was invited by some friends to accompany them from their home to defendant city of Thief River Falls. The party was composed of four persons, and proceeded to said city in a two-seated spring wagon drawn by a team of horses driven by one Alexander, a member of the party. After arriving at said city, and when crossing the track of defendant railway company as it extends across one of the streets of the city, plaintiff was thrown from the wagon and injured, by reason of the alleged defective condition of the street. In an action for damages for such injuries, it is *held* that the evidence is sufficient to sustain the verdict of the jury, to the effect (1) that the

Cunningham *v.* City of Thief River Falls

street was defective and not in good repair for public use; (2) that defendants were chargeable with actionable negligence with respect to such condition; (3) that plaintiff was not guilty of contributory negligence; and (4) that the defective condition of the street was the proximate cause of her injury.

Same—Notice to City Officials Notice to City.—Actual notice to officers of a municipality of the defective condition of its streets, where such officers are clothed with general powers and duties with reference to the supervision and control of the corporate affairs, or are clothed with specific duties as to the care of the streets, is notice to and binding upon the municipality.

Same—Contributory Negligence for the Jury.—Whether plaintiff was chargeable with contributory negligence, because of the defective condition of the vehicle in which she was riding, was, under the evidence in the case, a question of fact for the jury.

Same—Negligence of Driver Not Imputable to Occupant of Vehicle.—It does not follow that, because several persons are occupants of the same vehicle, they are engaged in a joint enterprise, within the meaning of the law of negligence. In order to constitute a joint enterprise on the part of such persons, within the purview of such law, there should exist between them a joint, or community of, interest in the objects of the enterprise, and an equal right to direct and control the movements and conduct of each other with respect thereto. It is *held* in this case that, within this rule, plaintiff was not engaged in a joint enterprise with the driver of the vehicle in which she was riding at the time of her injury, and the negligence of the driver was not imputable to her.

Railroad in Street*—Duty to Restore Street to Its Ordinary Condition.*—A railway company may enter upon a public street or highway and appropriate it for railroad purposes by laying its track thereon, when authorized to do so by law, but such use must not interfere with the public travel; and the company must, in such case, restore the street to its ordinary condition, and maintain the railway crossing in reasonably safe repair for public use. And this duty and obligation is a continuing one, and exists independently of any obligation on the part of the municipality.

(Syllabus by the Court.)

Appeal from district court, Red Lake county; William Watts, Judge.

Action by Susanna Cunningham against the city of Thief River Falls and the Great Northern Railway Company. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

C. Wellington, Francis Hibner, Ira C. Richardson, W. E. Dodge, and Horace Bayless, for appellants.

H. Steenerson and Charles Loring, for respondent.

BROWN, J. This action was originally brought against defendant city of Thief River Falls to recover damages alleged to have been caused by the defective condition of one of its streets. Subsequently, upon application of the city, the Great Northern Railway Company was made a party defendant, under the provisions of chapter 8, Gen. Laws 1895, § 349. The city and railway company both answered the complaint, denying generally the negligence charged therein, and alleging contributory negligence on the

*See State *ex rel.* City of St. Paul *v.* Minnesota Transfer Ry. Co., and cross-reference *note, ante*, p. 360.

part of plaintiff. Plaintiff had a verdict in the court below for the sum of $4,000, which, on defendants' motion for a new trial, was ordered reduced by the trial court to the sum of $2,500, as a condition to a denial of the motion. Plaintiff consented to the reduction, and defendants appealed.

The material facts are as follows: In the fall of 1899 defendant railway company constructed a spur track upon and across the street on which happened the accident resulting in plaintiff's injuries, and in doing so erected an embankment thereon upon which to lay the track, the earth and material for which were obtained from two parallel ditches excavated on each side of the embankment as it extends across the street. The ditches were in the neighborhood of a foot deep, and about six feet wide on either side of the grade. The railway company failed to refill the same with earth, or restore the street to the condition it was in before the track was laid thereon, but, instead, filled them with wood shavings. After the construction of the railroad track, the street, which is one of the principal thoroughfares of the city, was extensively used by the public in the condition in which the railway company left it. The track was elevated somewhat above the level of the street, and from the constant use of the street over the same the shavings had become worn by travel, leaving the ditches about ten inches or a foot below its level, and considerably more than that below the level of the railroad embankment and track. The street remained in the condition as left by the railway company from the fall of 1899 to the time of the accident in 1900,—six months or more. Plaintiff resides at St. Hilaire. On the day in question, namely, April 6, 1900, she was invited to accompany some friends from that point to Thief River Falls. The party was composed of plaintiff, another lady and her husband, and one Alexander. They journeyed from St. Hilaire to Thief River Falls, a distance of about seven miles, in a two-seated spring wagon drawn by a team of horses; the ladies occupying the rear seat. After arriving at the latter place plaintiff was, when crossing the railroad track so located on the street in question, thrown from the wagon and injured, by reason, it is claimed, of the defective condition, of the street,—made so by the railroad ditches. That she was thrown from the wagon at this point there is no controversy; nor is there any serious dispute but that she received certain injuries, the nature and extent of which were contested on the trial, but are not materially involved on this appeal, the question having been settled by the verdict.

The questions presented to the jury for their determination on the trial below were (1) whether the street was in a defective condition, and whether such defect, if any existed, was the proximate cause of the accident and injury to plaintiff; (2) whether the defendant city had notice of the defect; (3) whether the spring wagon in which plaintiff was riding

was in good condition, or out of repair and not suitable for use on a public street in ordinarily good condition for public travel; and (4) whether plaintiff was chargeable with contributory negligence. A careful examination of the evidence presented in the record satisfies us that all these questions, being purely of fact, and for the jury to determine, are finally disposed of by the verdict. That the street was defective and in bad order for use there is no serious doubt. At least, the evidence fully sustains the finding of the jury that it was. Nor is there any doubt but that the city had both actual and constructive notice of that condition. In addition to the fact that the ditches were placed in the street, and refilled only with shavings, and so remained for some six months, from which the law would imply notice to the city, there is evidence in the case clearly showing that the mayor of the city had actual notice prior to the accident of the condition of the street at this point. The defect was upon one of the principal streets of the city, was open and plainly noticeable, and had continued in that condition for such a length of time that the city authorities might, with reasonable diligence, have known of it in ample time to have repaired the same. Cleveland v. City of St. Paul, 18 Minn. 279 (Gil. 255). Authorities holding that notice to officers of a municipality of defects in its streets or sidewalks is notice to and binding upon the municipality are numerous,—especially as to officers clothed with such general powers and duties as is the mayor of defendant city, under its charter. Section 58, c. 8, Gen. Laws 1895; Elliott, Roads & S. § 629; Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143; Keyes v. City of Cedar Falls (Iowa) 78 N. W. 227; City of Michigan City v. Ballance, 123 Ind. 334, 24 N. E. 117. The mayor of defendant city expressly testified having had notice of the condition of the street at this point a week or more prior to the accident. Our conclusion on this branch of the case is that the verdict of the jury to the effect that the street was in a defective condition, of which the defendant city had notice, cannot be disturbed. We do not understand counsel for appellant to seriously contend that it can. What they do complain of, and that with considerable force, is that the trial court erred in refusing certain of their requests for instructions, and in certain instructions to the jury given in its general charge. We will consider the errors urged in this connection in the order presented in the brief.

1. It is contended that the court below erred in refusing the following request to charge the jury: "If you believe from the evidence that the defect claimed in the street was of such a character that a person driving with ordinary care and prudence, under all the circumstances disclosed by the evidence, would not have sustained injury thereby, then negligence cannot be imputed to the defendant by reason of its existence." It is urged in support of this instruction that the

obligation and duty resting upon a municipality to keep its streets in a reasonably safe condition for public use do not impose upon it the obligation of keeping such streets absolutely safe; that there exists a correlative duty and obligation on the part of the municipality and a traveler to exercise reasonable care and prudence; that, as the city is required to keep its streets in a reasonably good state of repair, a traveler thereon is also required to exercise reasonable care for his own safety. There is no question as to the correctness of this position. The only duty a municipality owes the public in this respect is the exercise of reasonable care and prudence. And persons using the streets are required to exercise the same degree of care for their own safety and protection. The proposed instruction, the refusal of which is complained of, is in line with this principle of law, but the subject thereof was covered by the general charge. The court distinctly informed the jury that defendant city was liable for the failure to exercise ordinary care in the matter of keeping its streets in good repair, and also instructed them that it was the duty of plaintiff to exercise the same care for her own protection. Taking the whole charge together, conceding the request to be applicable to the case, the subject was sufficiently covered. It may be doubted, however, whether the request was applicable to the issues in the case. It refers particularly to a person driving upon the streets, and requires of such person the exercise of ordinary care and prudence. There is no claim that plaintiff was driving the team. In fact, she was not; nor does the evidence bring the case within the principle of law applicable to persons engaged in a joint enterprise. It is not a case where all were equally responsible for the conduct of the one driving the team. This subject will be referred to later. Our conclusion is that the subject of this request was sufficiently covered by the general charge, and its refusal was no error.

2. The court refused defendants' second request, which was substantially to the effect that if the jury found from the evidence that the defect in the street could be passed safely by a person driving with ordinary care and prudence in a reasonably safe vehicle, and that the vehicle in which plaintiff was riding was defective and unsafe, and that the team was not driven in a careful manner, and that by reason of which defective vehicle and improper driving the plaintiff was thrown to the ground and injured, she cannot recover; and, further, that a person driving on a highway is required to use a reasonably safe vehicle, and that a municipality is not required to anticipate the use of one that is defective. The latter part of the request was given in the general charge of the court, and we think, conceding the other portions to be pertinent to the case, that they are sufficiently covered, and it was no error to refuse the request. One objection to the proposed instruction is that it is somewhat involved, and would tend more to confuse the jury than to enlighten them.

But, for the reasons suggested with reference to the first request, it was properly refused. It is not claimed that plaintiff was driving the team; nor is there any evidence that she had control over, or was in any way responsible for the conduct of, the driver. The request involves the question whether plaintiff and her companions were jointly responsible for the management and control of the team. If they were, the negligence of Alexander, the driver, if his negligence be conceded, was imputable to plaintiff, and she cannot recover. Counsel for appellant contended on the argument that whether the parties were engaged in a joint enterprise was, under the evidence, a question of law for the court, and he urged that the evidence is conclusive that they were so engaged. We concur with him that, under the evidence, the question is one of law, but determine it adversely to his contention. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452; Beach, Contrib. Neg. (3d Ed.) § 115a. The plaintiff in this action was in no way connected or interested in the affairs of Alexander, or in the purposes of his visit to Thief River Falls. She did not own the team or wagon in which they were riding, nor have any control over the driver. She was a member of the party by invitation only, and for purposes purely personal to herself. The evidence is quite clear that the parties were not engaged in a joint enterprise, within the meaning of the law of negligence. The case at bar is very similar to Finley v. Railway Co., 71 Minn. 471, 74 N. W. 174. In that case it appeared that the plaintiff, a married woman, was riding with her husband, at his invitation, in his wagon, drawn by horses which he was driving. She had no control over the husband with respect to the management of the team, nor was he her servant or agent. It was conceded in that case, for the purposes of the decision, that the husband was guilty of negligence in driving upon the railroad track without looking and listening for an approaching train, but it was distinctly held that his negligence was not imputable to her. If any distinction can be made between that case and the one at bar, we are unable to point it out. Here, as there, the plaintiff was an occupant of the wagon by invitation. The driver was not her agent or servant, or in any way under her control; and it may be conceded that he failed to exercise ordinary care in driving across the railroad track, and that his negligence contributed to cause plaintiff's injury; still, within the rule of the Finley Case, his negligence cannot be imputed to her. Howe v. Railway Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684;

Lammers v. Railway Co. (Minn.) 84 N. W. 728; Follman v. City of Mankato, 35 Minn. 523, 29 N. W. 317; Wosika v. Railway Co. (Minn.) 83 N. W. 386. It does not, however, necessarily follow in such cases that because the negligence of the driver is not imputable to other occupants of the vehicle, because not jointly engaged with him, such other occupants may not be guilty of contributory negligence. A failure on their part to exercise reasonable and ordinary care to avoid the injury would constitute negligence which would prevent a recovery. Undoubtedly, if they were cognizant of the danger resulting in their injury, and failed to call the driver's attention to it, but permitted him to drive recklessly into it without protest on their part, no recovery could be had. Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. 449; Beach, Contrib. Neg. (3d Ed.) § 115. But the evidence is not such as to justify the conclusion, as a matter of law, that she was chargeable with independent contributory negligence. It is not claimed that she was familiar with the condition of the street, and whether she was guilty of contributory negligence because of a knowledge that the wagon seat was unfastened, and thus defective, was properly submitted to the jury. She was not negligent, as a matter of law, even if it be conceded that she had full knowledge of this defect. The question was one of fact for the jury. Malory v. Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; Jennings v. Town of Albion (Wis.) 62 N. W. 926.

3. The court charged the jury that if defendant railway company made an unauthorized excavation in the street in question, which it failed to properly repair, and if the excavation so made was the proximate cause of the accident to plaintiff, they should find a verdict against that defendant, if they further found against defendant city; in effect, that if the city was liable, and the excavation made by the railway company was the proximate cause of the accident, the railway company was also liable. If the court erred in this instruction, the error was against the plaintiff. It appears, beyond controversy, that the railway company entered upon the street and excavated ditches therein for the purpose of laying its railroad track, and the jury found that the street was thereby rendered defective. It does not appear by what right or authority the railway company laid its track on this street. Whether it was authorized to do so or not is immaterial. Presumably, its conduct was rightful. There is no showing to the contrary. It was, however, its duty, under the statute, to keep the railway crossing in good repair, and its failure to do so rendered it liable to persons injured in consequence of such neglect. A railway company may enter upon a public street or highway and appropriate it for railroad purposes by laying its track thereon, when authorized to do so by law; but such use must not interfere with the public travel, and the company must in such cases restore the street to its ordinary

condition, and maintain the railway crossing in reasonably safe repair for public use. Elliott, Roads & S. § 779. The instruction complained of was more favorable to the railway company than it was entitled to, within the law. The court, in effect, told the jury that the liability of the railway company was dependent upon the liability of the city. At least, the instruction is susceptible of that construction. If the court so intended, it was in error. The liability of the company and municipality in such cases may be concurrent, but the responsibility of the former is in no measure or degree dependent upon the liability of the latter. Conceding the right of the company to take possession of the street for its railroad track, it was bound to restore it, after making excavations therein, to its ordinary condition, and keep and maintain the crossing in ordinarily safe repair for public use. And the duty in this respect is a continuing one, and exists independently of any duty or obligation on the part of the city. Appellants cannot, therefore, complain of this instruction. State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3.

4. We have examined all other assignments of error urged by appellants, and find no sufficient reason for disturbing the verdict of the jury. In amount it is quite large, but, as reduced by the trial court, not so excessive as to justify interference by this court. Order appealed from affirmed.

COMPTON *v.* INHABITANTS OF TOWN OF REVERE.

(*Supreme Judicial Court of Massachusetts, Suffolk, June 19, 1901.*)

[60 N. E. Rep. 931.]

Defective Highway*—Liability of City for Acts of Third Persons†—Personal Injuries—Assuming the Risk.‡—A railroad was engaged in building a bridge in defendant town, over which a highway was to pass, by order of the county commissioners; permission from defendant's selectmen to close the street having been obtained. The selectmen had nothing to do with the work, which was abandoned in the fall, when the ground became frozen and the highways were rough and not in a condition for travel; the dirt being left as it had been dumped from carts, without being leveled. The evidence was conflicting as to whether barriers had ever been placed in the street. Plaintiff, after walking in the middle of the street on his way to a certain store in the daytime, fell down a bank three or four feet high, in attempting to get on the sidewalk, and was injured. He testified that the condition of the highway had existed over a month, the street being nothing but a dirt heap; that he had been to the store many times before; and that there was another way of reaching it, though it was more roundabout. *Held*, that plaintiff, knowing the condition of the street, voluntarily assumed the risk, and could not recover.

Street Not Open for Public Travel.—The fact that some wagons passed over the highway was insufficient to show that it was open for public travel.

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*See *note* to City Council of Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 566 *et seq.*; Vergin *v.* City of Saginaw, 5 Mun. Corp. Cas. 275, and *note.*

†Independent contractors, see 5 Mun. Corp. Cas. 374.

‡See *notes*, 4 Mun. Corp. Cas. 648 *et seq.*

Compton *v.* Inhabitants of Town of Revere

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by David T. Compton against the inhabitants of the town of Revere. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions sustained.

Sherman L. Whipple and Ethelbert V. Grabill, for plaintiff.

Louis L. G. De Rochemont, for defendant.

LATHROP, J. The plaintiff seeks to recover for personal injuries sustained by him on account of an alleged defect in a highway in the defendant town. The jury returned a verdict for the plaintiff; and the case is before us on the defendant's exceptions. There were 11 requests for instructions, only one of which need be considered, and that is the last, which is as follows: "That, upon all the evidence in the case, the verdict should be for the defendant."

The undisputed facts in the case are that in consequence of an order of the county commissioners made on September 1, 1896, it became necessary for the Boston, Revere Beach & Lynn Railroad Company to build a bridge over which Beach street was to pass, and to raise the grades of Beach street and of Ocean avenue,—two highways running at a right angle with each other. The railroad company, by the order, had a year in which to do the work. At the request of the railroad company, the board of selectmen of the defendant town voted to grant permission to the company to close the streets; and the selectmen had nothing to do with the work that was being done on these streets during the fall, winter, and spring of 1896 and 1897. The work of changing the grade began about the last of September, 1896, and continued until some time in December of that year. The ground then became frozen, and the work had to be abandoned until the next spring. When work ceased in December, Beach street was in a very rough condition. The dirt lay as it had been dumped from the tip carts, and had not been leveled off, and it was obvious to every one who saw it that it was not in condition for public travel. The plaintiff lived on Kimball avenue,—a street west of the bridge on Ocean avenue, and running diagonally into that avenue. On the morning of March 1, 1897, the plaintiff left his house, crossed the bridge, which was then incomplete, went into the middle of the street, and made his way along Beach street until he came opposite the grocery of one O'Brien. There was a bank of earth there, three or four feet above the sidewalk. In attempting to go down this, he slipped and fell, and sustained the injuries complained of. The plaintiff testified that he had been to O'Brien's many times during the eight months preceding the accident, and that the general condition of things had existed for over a month, and that the street was nothing but a dirt heap, and that there was another way of getting to

O'Brien's, but it was more roundabout. It is obvious that the plaintiff knew all that there was to know about the condition of things, and, in attempting to use the street, did it at his peril. The case cannot be distinguished from Jones v. Collins, 177 Mass. 444, 59 N. E. 64, unless the question of a want of barriers makes a difference. There was a conflict of evidence on the point whether barriers had ever been placed on Beach street. But we do not regard the question as material in this case. The object of a barrier is to notify the public that it is unsafe to proceed, but, where the condition of the street is such as is shown by the evidence in this case, the condition itself is as strong a notice as any that could be given. Nor do we regard it as material that prior to the accident some wagons were driven over the street. There are always persons who take risks, if a short cut can be made, and who will go over a street even if it is obviously not open to public travel. There is not enough in this case to show that at the time of the accident the way was open to public travel. This is not the case of a person entering upon a street in the nighttime, which he has no reason to suppose defective, but of a person entering a street in the daytime, the grade of which he knows is being changed, and which he also knows is not graded or fit for public travel. Under these circumstances, we are of opinion that the eleventh request should have been given. See Howard v. Proprietors, etc., 12 Cush. 259. Exceptions sustained.

HAMPTON *v.* MAYOR, ETC., OF CITY OF MACON.

(*Supreme Court of Georgia, March 27, 1901.*)

[38 S. E. Rep. 387.]

Defective Street—Personal Injuries—View by Jury*—Objections—Exceptions.—When, in the trial of an action against a municipal corporation for damages alleged to have been received by the plaintiff by reason of a defect in a street, counsel for the defendant made a motion that the jury be allowed to inspect the street at the point where the defect was alleged to be, and when the judge granted the motion after having inquired of plaintiff's counsel if he objected, remarking that the matter was one within the discretion of the court, and after having been informed by counsel that in that case no objection was made, *held*, that no ruling of the court was made or invoked, and that there was nothing to which exceptions could be taken. (a) The fact that the inquiry as to whether there was objection was made in the presence of the jury was not ground for a new trial.

Verdict Supported by Evidence.—The evidence warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by J. H. Hampton against the mayor and council of

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*See Kentucky Cent. R. Co. *v.* Smith (Ky.), 18 L. R. A. 63; Stewart *v.* Cincinnati, etc., R. Co. (Mich.), 17 L. R. A. 539; monographic *note*, 42 L. R. A. 368 *et seq.*

the city of Macon. Judgment for defendant, and plaintiff brings error. Affirmed.

M. G. Bayne, for plaintiff in error.
Minter Wimberly, for defendant in error.

PER CURIAM. Judgment affirmed.

NELLUMS *et ux. v.* MAYOR, ETC., OF CITY OF NASHVILLE.

(*Supreme Court of Tennessee, Jan. 12, 1901.*)

[61 S. W. Rep. 88.]

Defective Street—Personal Injuries—What May Be Shown under Plea of Not Guilty.—Under the plea of not guilty, in an action against a city for personal injuries, it may show that it never accepted the portion of the street where the accident was alleged to have occurred.

Pleading—Objection Must Be Urged, When.—A party who made no effort to obtain delay on account of testimony introduced under the pleadings cannot, after verdict found against him, apply for a new trial on the ground of surprise.

Defective Crossing—Acceptance of Street by City*—Instructions.—On an issue as to whether a city had accepted the portion of a street where an accident occurred to a pedestrian by reason of a defective crossing, the jury were told that if the city had not accepted the street, though it had been taken into the corporate limits, either by some formal act of acceptance, or by working the same or repairing it, they should find for defendant, but if it had accepted the same, or attempted to put it in condition for public use, they should ascertain whether it had constructed the cross walk and had exercised control over it, or permitted some other persons to erect the walk, and afterwards accepted it, and, if so, it should have kept it in repair, and would be responsible for negligent failure to do so. *Held*, a sufficient presentation of the law.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Action by D. A. Nellums and wife against the mayor and city council of Nashville. From a judgment for defendant, plaintiffs appeal. Affirmed.

Rutherford & Rutherford and H. A. Luck, for appellants.
E. A. Price and K. T. McConnico, for appellee.

WILKES, J. This is an action against the mayor and city council of Nashville for damages for personal injuries sustained by Mrs. Nellums on account of a defective plank walk upon what is called in the record "Bellville Street." There was a trial before a jury in the court below, and verdict and judgment for the city, and the plaintiff has appealed and assigned errors.

The first error assigned is that court below should have granted a new trial upon the ground of surprise and newly-discovered evidence. In support of this assignment, plaintiff states that the city did not disclose its real defense until its

*See Reuter *v.* Lawe, Exrx. (Wis.), 34 L. R. A. 733, briefs 734, 735; Southern Pac. R. Co. *v.* Ferris (Cal.), 18 L. R. A. 510, and *note*; *notes*, 5 Mun. Corp. Cas. 197; 4 Mun. Corp. Cas. 251, 296; 3 Mun. Corp. Cas. 354; 1 Mun. Corp. Cas. 345, 763.

last witness, Pat Cleary, was examined. This witness, in substance, stated that the city of Nashville had never done any work on the west side of Bellville street, nor had it in any other manner accepted the same as a street since it was included within the corporate limits of the city, in 1890. The insistence is that this was a great surprise to the plaintiff, inasmuch as the fact of nonuse and nonacceptance was not specially pleaded, and the street had been used by the public, and was in a thickly-settled part of the city, and had been recognized as a street by the public in numerous ways and at many times after it was taken into the city, and prior to the accident. The affidavit upon which the application of a new trial is based states this feature of surprise, and adds that plaintiff will make proof of use and many other facts showing acceptance on the part of the city, and it is supported as to the latter feature by the sworn statements of quite a number of witnesses. The city filed only one plea,—that of not guilty,—and upon this the plaintiff took issue. Under the plea, and upon this issue, we think it clear that the city might show by evidence that it had never accepted that portion of the street where the accident occurred. Some evidence was introduced upon this feature of acceptance, other than the testimony of Mr. Cleary, and at an earlier period of the trial Mr. McConnico, the street overseer, testified that the portion of the street complained of was taken into the corporate limits in March, 1890, but that the city had done no work or repairing upon it up to the time of the accident, and it would be impossible to do it until a sewer was built, and that nothing had ever been done; that there is at the place an old ravine, through which a branch runs, and there were little footways running to the houses, across this. This being true, the plaintiff was bound to take notice of every defense that could be legally advanced under the plea of, the general issue. Conceding the proposition to be correct that the evidence was within the issues presented by the pleadings, surprise cannot be predicated upon the fact that evidence was not anticipated along any line embraced within the pleadings. The doctrine is thus laid down in 16 Am. & Eng. Enc. Law. (Old Ed.) p. 544: "The fact that an adversary's evidence is different from what it was supposed it would be is not sufficient. If there has been any want of diligence in ascertaining what the testimony of a witness would be, a new trial will be refused." In 15 Enc. Pl. & Prac. 733, it is said: "A party is bound to come prepared to meet the case made by his adversary, and he cannot plead surprise at material and relevant testimony." In support of this proposition are cited Cole v. Coal Co. (Sup.) 10 N. Y. Supp. 417; Knapp v. Fisher, 49 Vt. 94; Davis v. Ruggles, 2 Chand. 152; Bragg v. City of Moberly, 17 Mo. App. 221; McNeally v. Stroud, 22 Tex. 229; Anderson v. Duffield, 8 Tex. 237; and a number of other cases. Another principle of law applicable to motions for new trial

upon the ground of surprise is that the party who is thus surprised in the course of the trial must make all necessary efforts to secure delay by proper legal methods, in advance, to meet the matter of surprise. It appears from the affidavit of the plaintiffs that evidence of the acceptance of the street by the city could be readily had. Indeed, in the affidavit it is said that this evidence was so plentiful that they did not think it would be needed. The plaintiff D. A. Nellums was put back upon the stand after the evidence of Cleary had been given, and he failed to give any evidence on the point. No delay or indulgence was asked by the plaintiffs. The plaintiffs could not, without making any effort to obtain such delay, go to trial, and, when the verdict is found against them, ask for a new trial upon the ground of surprise. 16 Am. & Eng. Enc. Law, p. 533. The rule is thus laid down: "The first duty of counsel surprised at the trial is to secure delay by proper legal methods, but he cannot neglect this in hope of securing a verdict in spite of surprise, and then obtain a new trial." Id. See, to same effect, Railroad Co. v. Jones, 100 Tenn. 512, 45 S. W. 681; Shipp's Adm'r v. Suggett's Adm'r, 9 B. Mon. 5; Mehan v. Railroad Co., 55 Iowa, 305, 7 N. W. 613.

It is said that the court should have charged certain requests, seven in number, which the court erroneously declined to do. Upon examining the charge, we find it is quite full upon the subject of acceptance of the street by the city, and no complaint is made of any positive error in it. The requests go mainly to the question as to what acts would amount to or constitute an acceptance on the part of the city,—putting hypothetical or supposed cases of repairs made, work done, or other acts indicating acceptance. We think the charge of the court, as given, fully covered the facts as they appeared in the record, as to acceptance, and the duty of the city after acceptance was plainly stated. The jury were told that if the city had not accepted the street, although it had been taken into the corporate limits, either by some formal act of acceptance, or by undertaking to open that part to the street by working the same or repairing the same and putting it in order for the public use, then they should find for defendant, but if the jury should find that proposition against the defendant, and that it had accepted the same, or graded it or worked upon it, and attempted to put the same in a condition for public use, then they should ascertain whether the city had constructed the passway over or across one of its streets, or part of it, and had exercised control over it, or permitted some other person to erect the walkways, and afterwards accepted them, and, if so, it should have kept them in repair, and it would be responsible for negligent failure to do so. This appears to be a full charge upon the facts as they were presented by the record, and is a fair statement of the law, and is not, so far as it goes, complained of. 2 Dill. Mun. Corp. § 642; Forbes v. Balenseifer, 74 Ill. 187; State v. Bradbury, 40 Me. 154, 160;

Tied. Mun. Corp. § 223, p. 421. We think the several requests, so far as they are sound law, are covered by and embraced within the general charge, and that, upon the record as we find it, the charge was full and correct, and the requests very largely present hypothetical cases which are not presented by the record as made. We do not find any reversible error in the action and judgment of the court below, and it is affirmed, with costs.

BRADBURY *v.* INHABITANTS OF CITY OF LEWISTON.

(*Supreme Judicial Court of Maine, April 1, 1901.*)

[49 Atl. Rep. 1041.]

Defective Bridge—Personal Injuries—Presumption of Notice of Defective Condition.*—The defendant city, in constructing an iron bridge, placed iron plates at intervals transversely across the bridge to provide for the expansion and contraction of the iron of which the bridge was constructed. To provide for the laying of the tracks of a street railway along the bridge, the plates, before being placed in position, were cut into sections, and were thus laid across the bridge. When first placed in position the plates lay flat upon the floor of the bridge, and were not obstacles to public travel. Subsequently the travel upon the bridge caused the ends or corners, of some of the sections of the plates, where they had been cut in twain, to turn or roll up to a height of two or two and a half inches.

The felloe of one of the wheels of the plaintiff's carriage caught under a turned up end of one of the sections of plate, by which he was thrown from his carriage, sustaining injuries for which he claims damages of the defendant city.

Held, that the knowledge which the city had of the condition and position of the sections of plates as originally laid was not actual notice of the identical defect which caused the plaintiff's injuries, but was notice only of a cause which might produce a defect.

Same—Same—Same.—Upon an examination of all the evidence reported, the court is of the opinion that a jury could not reasonably infer a statutory 24 hours' notice to the defendant city of the defect alleged.

(Official.)

Report from supreme judicial court, Androscoggin county.

Action by Russell S. Bradbury against the inhabitants of the city of Lewiston. Case reported. Plaintiff nonsuit.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, and FOGLER, JJ.

Geo C. Wing, for plaintiff.

J. L. Reade, City Sol., for defendant.

FOGLER, J. This is an action on the case to recover damages for personal injuries and damages to his wagon and

*See *note* to Dundas *v.* Lansing (Mich.), 5 L. R. A. 144–146; Village of Shelby *v.* Clagett, 46 Ohio St. 549, 5 L. R. A. 606; *note*, 5 L. R. A. 255; Burns *v.* City of Bradford (Pa.), 11 L. R. A. 726; *note*, 22 L. R. A. 829; Thomas *v.* City of Flint (Mich.), 47 L. R. A. 499; Moore *v.* Kenockee (Mich.), 4 L. R. A. 555; Tyler *v.* Williston (Vt.), 9 L. R. A. 338; *notes*, 10 L. R. A. 179, 180, 476, 738, 739; 5 Mun. Corp. Cas. 148; 2 Mun. Corp. Cas. 737; 1 Mun. Corp. Cas. 474 *et seq.*

harness, which the plaintiff alleges that he sustained on the 12th day of May, 1899, by reason of a defect in the bridge spanning the Androscoggin river, connecting the cities of Lewiston and Auburn, on that portion of the bridge which is within the limits of the city of Lewiston, and which that city is bound by law to maintain and keep in repair.

The defect complained of is that "a plate which formed a part of the construction of the bridge was turned up or rolled up at the end in such a position that a wheel on the floor of the bridge, crossing the bridge diagonally, would be caught under the plate."

The declaration alleges that on the day above named, as the plaintiff was riding over said bridge, the felloe of one of the wheels of his wagon caught under the end of a plate so as aforesaid turned up, which stopped the progress of his team so suddenly that he was violently thrown from his wagon, and sustained injuries for which he claims to recover damages.

The case comes here upon a report of the evidence bearing upon the question whether the municipal officers or road commissioners of the defendant city had 24 hours' actual notice of the defect or want of repair, and upon the stipulation following, to wit:

"If the law court is of the opinion that upon this evidence a jury could reasonably infer a statutory twenty-four hours' notice to the city of Lewiston, the action is to stand for trial; otherwise, the plaintiff to be nonsuit."

The report shows that when the bridge in question was built, in 1897, certain iron plates, each eleven inches wide and about five-eighths of an inch thick, were prepared to be placed at intervals, and secured upon one side, across the entire width of the bridge, to provide for the expansion and contraction of the iron of which the bridge was constructed.

When the plans for the bridge were prepared it was not contemplated that the bridge would be used for street-railway purposes, and it was intended that the plates should extend across the bridge unbroken, and not in sections.

Subsequently, and before the iron plates referred to were laid, double tracks of street railway were laid over and along the bridge. In laying the railway tracks it was found necessary to cut each of the said iron plates transversely upon each side of each railway track. It was soon found that by the use of the bridge the ends, or corners of the ends, of the plates where they had been cut were liable to turn or roll up so as to interfere with public travel.

It was under one of the turned-up ends of one of the plates so cut that the felloe of the plaintiff's wheel caught, causing him to be thrown from his wagon. It is contended in behalf of the plaintiff that, by reason of the cutting of the plates, the way thereby was defective in that respect, and so remained defective until this accident occurred, and that as such cutting was done by the city, or at least under its direction, the city

had actual notice of the defective condition caused thereby. In other words, to use the language of the plaintiff's counsel, "that the defect was original, and was made by the city itself in deforming and mutilating these plates, so that they became at once defective."

We do not think that such position is tenable. It is not claimed that the plates were dangerous to travel, so long as they lay flat upon the floor of the bridge, as they were when laid. The defect occurred when the plates turned up, and so became an obstacle to travel. If the plates were so laid as to be likely to produce a defect, notice of that fact would not be notice of the identical defect which produced the injury to the plaintiff.

In Pendleton v. Northport, 80 Me. 598, 16 Atl. 253, the plaintiff's horse was injured while he was attempting to cross a covered culvert which had become out of repair from an overflowing caused by unusually heavy rains. It was established at the trial that the culvert, in its original construction, was not of sufficient size to readily vent at all times the quantity of water seeking its way through it. The plaintiff contended that knowledge on the part of the town of the original construction of the culvert, and of its susceptibilities and tendencies for getting out of repair in case of a heavy rainfall, were actual notice of the defect produced by such causes, and that the under-sized culvert was the proximate and responsible cause of the accident. The court overruled this contention, saying: "We do not believe that the law imposes upon towns such an enlarged liability as that construction would require of them." It is further laid down in that case that "notice of the cause of the defect, or of some conditions which in some contingency might cause or create a defect, is not sufficient"; and, further, "the defect was the broken, and not the unbroken, culvert,—the culvert as it was after, and not before, the deluge of rain." See cases there cited, and also Gurney v. Inhabitants of Rockport, 93 Me. 360, 45 Atl. 310; Littlefield v. Inhabitants of Webster, 90 Me. 213, 38 Atl. 141.

Applying the rule thus laid down, it is manifest that the defendant city did not, by reason of its knowlege of the construction of the bridge, have actual knowledge of the identical defect which caused the plaintiff's injury.

It may be true that the road commissioner may have known that the plates were liable to become bent, and thus defective, and have been negligent relative thereto; but as the court say in Hurley v. Inhabitants of Bowdoinham, 88 Me. 293, 34 Atl. 72: "Evidence that a highway surveyor negligently disregarded a general complaint * * * has no tendency to prove that he had notice of a particular defect. * * * But proof of gross inattention is not proof of actual notice." To the same effect is Littlefield v. Inhabitants of Webster, supra.

Nor are we satisfied from the evidence reported that the

city in any way had 24 hours' actual notice of the identical defect complained of. A witness testifies that on May 10th a wheel of his wagon was caught by the upturned end of another plate, and that he notified the street commissioner of this defect about noon of May 11th, but did not give notice of any other defective plate. The road commissioner testifies that such notice was given him by said witness at about 4 o'clock in the afternoon of the 11th, and that he immediately went to the place complained of and made necessary repairs, but that he did not examine the plate which caused the plaintiff's injury. As the plaintiff's accident occurred in the forenoon of May 12th, the notice, if it had been of the identical defect which caused the accident to the plaintiff, whether it was given at noon or at 4 o'clock in the afternoon, would not have been 24 hours' notice before the plaintiff's accident occurred. We are therefore of the opinion that, upon the evidence reported, a jury could not reasonably infer a statutory 24 hours' notice to the city of Lewiston, and that, in accordance with the stipulation, a nonsuit must be ordered.

Plaintiff nonsuit.

MATTSON *v.* CITY OF ASTORIA.

(*Supreme Court of Oregon.*)

[65 Pac. Rep. 1066.]

Statute Exempting City and Members of Council from Liability for Defective Streets Unconstitutional.*—Astoria City Charter (Sess. Laws 1891, p. 280; Sess. Laws 1895, p. 572), vesting in the mayor and council the control of streets, and providing that neither the city nor any member of the council shall be held liable for any damages resulting from any defective street, is repugnant to Const. art. 1, § 10, guarantying to every person a remedy by due course of law for injury done him in person or property.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Action by Henry Mattson, guardian ad litem for Susan Mattson, against the city of Astoria. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Smith, for appellant.

George Noland, for respondent.

BEAN, C. J. This is an action against the city of Astoria to recover damages for an injury alleged to have been caused by its failure to keep one of its public streets in repair and suitable for travel. The validity of a clause of the city charter exempting the city and the members of the council from liability in such cases is the only question presented by this appeal. By its charter, the city, the power and authority of which are vested in the mayor and common council (Sess. Laws 1891, p. 280), is given control and management of the

*See *notes*, 2 Mun. Corp. Cas. 64; 5 Mun. Corp. Cas. 572.

streets, and authority to raise money for their improvement and repair (Sess. Laws 1895, p. 556, §§ 75, 77, 79); and the common council is vested with the express authority "to assess, levy and collect taxes for general municipal purposes," and to provide "for the cleaning and repairing" of streets (Id. p. 564, § 38.) The charter also provides that "neither the city of Astoria nor any member of the council thereof shall in any manner be held liable for any damages resulting from a defective condition of any street, alley or highway thereof." Id. p. 572. The court below held this clause void, because repugnant to section 10, art. 1, of the state constitution, which provides that "every man shall have remedy by due course of law for injury done him in person, property, or reputation," and in this view we concur. That it is within the power of a legislature to exempt a city from liability to persons receiving injuries on account of streets being defective or out of repair, is unquestioned. O'Harra v. City of Portland, 3 Or. 525. But in such case the injured party is not wholly without remedy. He may proceed personally against the officers to whom the charter delegates the duty of keeping the streets in repair, and from whose negligence the injury resulted. "It is settled law in this court," says Mr. Justice Finch, "that one who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties." Bennett v. Whitney, 94 N. Y. 302. Mr. Justice Swayne says: "The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct." Amy v. Supervisors, 11 Wall. 136, 20 L. Ed. 101. See, also, 1 Shear. & R. Neg. (5th Ed.) § 313; 1 Dill. Mun. Corp. (4th Ed.) p. 325, note; Rankin v. Buckman, 9 Or. 253; Balls v. Woodward (C. C.) 51 Fed. 646; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Hover v. Barkhoof, 44 N. Y. 113; Telarney v. Smith, 86 Ill. 391; Butler v. Ashworth, 102 Cal. 663, 36 Pac. 922; Nowell v. Wright, 3 Allen, 166, 80 Am. Dec. 62. A provision, therefore, of the city charter exempting the city from liability for damages resulting from defective streets is not violative of the constitutional provision referred to, because it does not wholly deny the injured party a remedy for the wrong suffered. The charter provision in question, however, goes further. It provides that neither the city nor any member of the council shall be liable, and, if valid, prevents a common-law action against the members of the council for their negligent acts or omission, and is practically, therefore, a denial of any remedy, as they are the only officers charged with the duty of keeping the streets in repair. The constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property is found in the constitutions

of many of the states, and means, as said by the supreme court of Missouri, "that for such wrongs as are recognized by the law of the land the courts shall be open and afford a remedy" (Landis v. Campbell, 79 Mo. 433, 439, 49 Am. Rep. 239); or, as interpreted by the supreme court of Wisconsin, "that laws shall be enacted giving a certain remedy for all injuries or wrongs" (Flanders v. Town of Merrimack, 48 Wis. 567, 575, 4 N. W. 741). It was intended to preserve the common law right of action for injury to person or property, and while the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies (McClain v. Williams, 10 S. D. 332, 73 N. W. 72; Reining v. City of Buffalo, 102 N. Y. 308, 6 N. E. 792), it cannot deny a remedy entirely. It is immaterial, therefore, whether a municipal corporation is technically liable at common law for negligence in not keeping its streets in repair, because, as said by Mr. Justice Earl in Fitzpatrick v. Slocum, 89 N. Y. 358, "there must be a remedy in such a case, where one is injured, without any fault of his own, by a defect in one of the streets or bridges of the city,—either against the city or some one of its officers." And the charter of Astoria attempts to deny both. Whether a municipal corporation was liable to a common-law action or not, its officers were so liable to an individual specially damaged by their negligent act or omission; and the charter provision under consideration attempted to take away the remedy against the officers, as well as against the city, and is therefore void. Judgment affirmed.

RUPP *v.* HOWARD.

(*Supreme Court of Iowa, May 16, 1901.*)

[86 N. W. Rep. 38.]

Personal Injuries—Testimony of Persons Other Than the Attending Physician as to Declarations of Present Suffering.—Persons other than plaintiff's attending physician may testify in an action for personal injuries as to declarations made after the injury by plaintiff as to her present suffering.

Same—Scales in Street—Evidence.—Evidence that the road supervisor authorized defendant to erect scales in a street is not admissible in an action for injuries received because of such scales, since the road supervisor had no authority to grant such right.

Defect in Street*—Stock Yards in Streets—Evidence.—Evidence of an ordinance authorizing defendant to maintain stock yards within the limits of a municipal corporation, but not on its streets, is immaterial, in an action for a personal injury resulting from the maintenance of scales in the street.

Appeal from district court, Allamakee county; W. A. Hoyt, Judge.

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*See 5 Mun. Corp. Cas. 146, 278, 566; 4 Mun. Corp. Cas. 650; 3 Mun. Corp. Cas. 32, 101; 2 Mun. Corp. Cas. 27; 1 Mun. Corp. Cas. 58, 474 *et seq.*, 489 *et seq.*

Rupp *v.* Howard

The defendant owned and operated a wagon scale which was set in a public street of Waukon. It was surrounded by a board rack, fastened with hinges at the corners. The plaintiff was in her father's buggy, with her father and other members of the family; and when passing the scale in question, and while in said street, one end of the scale rack swung around against the team, and so frightened the horses that they ran away. The plaintiff was thrown from the buggy, and sustained injuries, for which she seeks recovery in this action. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

H. H. Stilwell, for appellant.

Dayton & Dayton, for appellee.

SHERWIN, J. The scale and rack in question had been in use for a long time before the accident complained of. Its location was familiar to the plaintiff and to her brother, who was driving the team at the time. There was another street which they might have traveled in reaching their destination, and it is contended by the defendant that it was contributory negligence to use the street on which the scale was situated. There is nothing in the record before us justifying the holding that there was contributory negligence as a matter of law. The condition of this and other streets at the time was before the jury, as were all the other facts and circumstances surrounding the transaction which might have caused freight of the team, or which might have constituted negligence on the part of the plaintiff or her brother. As to all of these matters there was at least sufficient conflict to send the case to the jury. We have read the record with much care, and are fully convinced that the verdict is well supported by the evidence.

The plaintiff's father was permitted to testify, over the objections of the defendant, that she had complained of the pain and suffering caused by her injuries. It conclusively appears that these complaints were of present pain, and did not refer to the past. The defendant concedes that the testimony of the attending physician is competent along this line, but urges that no other person may so testify. We think it a well-settled rule that in cases of this kind such complaints may be shown by any one. Greenl. Ev. § 102; Kearney v. Farrell, 28 Conn. 317, 73 Am. Dec. 677; State v. Howard, 32 Vt. 380; Hatch v. Fuller, 131 Mass. 574; Gray v. McLaughlin, 26 Iowa, 279; Blair v. Madison Co., 81 Iowa, 313, 46 N. W. 1093; McDonald v. Franchere, 102 Iowa, 496, 71 N. W. 427; Aryman v. City of Marshalltown, 90 Iowa, 350, 57 N. W. 867; Keyes v. City of Cedar Falls, 107 Iowa, 509, 78 N. W. 227.

Defendant offered to prove that when the scale was placed in the street, in 1878, he had the consent of the road supervisor, and, further, that in 1885 an ordinance was passed by the city council of Waukon authorizing him to maintain a stock yard within the corporation, but not in the street, and that when he

applied for permission to maintain such yard, and when the ordinance was passed, it was also understood and agreed that he could continue his scale in the street. This evidence was all rejected, and we think rightly so. In the first place, a road supervisor could grant no right of the kind. The ordinance and resolutions offered did not refer to the scale, and there is nothing in the record offered tending to show any license or grant; nor was any issue tendered by the defendant which would make such evidence competent, under any view of the case.

The instructions criticised announce correct rules of law, and, when read in connection with the whole charge, are not misleading. The judgment is affirmed. Affirmed.

HERRIES *v.* CITY OF WATERLOO.

(*Supreme Court of Iowa, May 29, 1901.*)

[86 N. W. Rep. 306.]

Defects in Street*—Rapid Driving—Personal Injuries—Admission of Ordinance to Show Contributory Negligence.—Where, in an action for injuries, alleged to have been received by reason of defects in one of defendant city's streets, there was evidence to show that plaintiff was driving at a greater speed than six miles per hour. Ordinance 136, §§ 1, 10, forbidding driving at a speed greater than six miles per hour, and providing that a violation of the ordinance shall be a misdemeanor, was admissible to show contributory negligence.

Ordinance in Evidence—Admission of Part.—Where certain sections, only, of an ordinance, are offered in evidence, the exclusion thereof on the ground that the subject of the ordinance is not clearly expressed in the title is erroneous.

Personal Injuries—Admission of Ordinance to Show Contributory Negligence.—In an action for injuries received by reason of plaintiff's sleigh being overturned by striking a stone placed in defendant city's street so as to prevent driving over the curb and the park laid out along such curb, an ordinance of the city, authorizing the parking and curbing of such street, is admissible as bearing on the issue whether defendant was negligent.

Same—Physician Testifying as to Confidential Communications.—Code, § 4608, providing that a physician shall not be permitted to disclose confidential communications made to him in his professional capacity, does not preclude a physician from testifying as to statements made by a patient as to his health, and also as to observations made by him at times other than when under employment.

Same—Obstruction in Street—Contributory Negligence†—Question for the Jury.—In an action for injuries received by reason of plaintiff's sleigh striking a stone placed in defendant city's street by such city, the questions whether it was placed in the traveled way, and whether plaintiff's attention was diverted at the time, as claimed, is for the jury.

Same—Same—Same—Same.—The question whether or not, under the evidence, plaintiff, who was injured by reason of his sleigh striking an obstruction placed in defendant's street, would have escaped injury had he been driving at a lawful rate of speed, is for the jury.

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*See cross references to Rupp *v.* Howard, *ante*, p. 593.

†See 5 Mun. Corp. Cas. 278, 568; 4 Mun. Corp. Cas. 648 *et seq.*; 2 Mun. Corp. Cas. 27; 1 Mun. Corp. Cas. 490.

Appeal from district court, Blackhawk county; A. S. Blair, Judge.

Action to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant, and without fault on the part of the plaintiff. Defendant denied generally. Verdict and judgment for plaintiff for $5,000. Defendant appeals. Reversed.

J. E. Williams and Mullan & Pickett, for appellant.
Burns & Stewart and Courtright & Arbuckle, for appellee.

GIVEN, C. J. 1. Plaintiff, a physician, was called to visit a patient about 3 a. m., February 27, 1897. He started in a sleigh along Fifth street, at its intersection with Washington street, into which he turned in a southeasterly direction. Part of Fifth street was parked and curbed on each side, leaving a traveled driveway 40 feet wide in the center. At the corner of the intersection a stone was placed to prevent driving over the curb and park. Plaintiff, in turning into Washington street, struck this stone with his sleigh, which was overturned, and he was injured. The charge is that the defendant carelessly and negligently permitted and allowed said stone "to remain and lie in the open and traveled portion of said street." The only controversy as to the facts is as to the location of the stone, the speed at which the plaintiff was driving, and the extent of his injuries caused by the accident.

2. Appellant offered in evidence sections 1 and 10 of Ordinance 136, to which plaintiff objected as incompetent, irrelevant, and immaterial. Appellant contends that the objection was sustained, and that this was error; while appellee contends that a ruling was reserved, that the matter was not again called to the attention of the court, that no ruling was made thereon, and therefore affords no ground for assignment of error. Said section 1 forbids driving faster than at the rate of six miles an hour, and said section 10 provides that the violation of the ordinance shall be a misdemeanor. Later appellee added to his objection "that the subject of the ordinance is not clearly expressed in the title, and is therefore void under the law." Appellee's amendment to abstract shows as follows: "The objection to second ordinance offered, the ordinance relating to fast driving or obstruction of streets, the objection to that is sustained, and the defendant excepts." This contention is argued at length, and with many citations, but, as we view the record, it is clear that the objection was ruled upon, was sustained upon all the grounds thereof, and the ruling duly excepted to, and assigned as error. The objection that the sections of the ordinance offered were incompetent, irrelevant, and immaterial was not well taken. If plaintiff was driving at an unlawful rate of speed, he was negligent; and, if that negligence caused or contributed to his injuries complained of, he cannot recover. See Fernbach v. City of Waterloo, 76 Iowa, 598, 41 N. W.

370; Tobey v. Railway Co., 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496; Young v. Railway Co., 100 Iowa, 357, 69 N. W. 682. Many other cases to the same effect might be cited. We think the parts of the ordinance offered were competent, relevant, and material, in view of the evidence tending to show that plaintiff was driving at a greater speed than six miles an hour when the accident happened. If the ruling was upon the ground "that the subject of the ordinance is not clearly expressed in the title," it was erroneous for the reason that the title to the ordinance was not offered in evidence, and is not before us. Only sections 1 and 10 were offered. Appellant also offered in evidence the ordinance which authorized the parking and curbing parts of Fifth street, to which plaintiff objected as incompetent, irrelevant, and immaterial, and the objection was sustained. This ordinance is relevant, competent, and material, as bearing upon the issue whether the defendant was negligent as charged; and the objections should have been overruled.

3. Dr. Fullerton, formerly a partner of the plaintiff, and Small, another personal acquaintance of plaintiff, were called by defendant to show plaintiff's condition of health prior to the accident, and were asked as to statements made by plaintiff concerning his health. It appeared that Dr. Fullerton had been called on certain occasions to treat the plaintiff, and possibly Dr. Small also. The plaintiff objected as incompetent under section 4608 of the Code, and the court held that plaintiff's statements to the witness when under employment might not be given in evidence, but that statements to and observations by the witness at other times might. This is the correct rule, but the court seems to have misapplied it in a few instances. This, however, need not occur on another trial, and therefore requires no further notice.

4. Appellant discusses the issues of negligence, insists that the verdict is contrary to the instructions, that the court erred in refusing to give certain instructions, and in giving its eleventh instruction. As, for the reasons stated, the judgment must be reversed, we need not notice these contentions at length. It was for the jury to determine whether the stone was in the traveled way, and whether plaintiff's attention was diverted. The instructions refused, in so far as they correctly stated the law, were covered by those given. The part of the eleventh instruction given complained of is where the court said, "But, if such immoderate gait does not contribute to the injury, then such a gait does not prevent a recovery." It is not questioned but that such is the law, but it is contended that under the evidence it is manifest that the accident would not have happened if plaintiff had been driving at a moderate gait. That was a question for the jury. Reversed.

BRUMMETT *v.* CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1901.*)

[60 N. E. Rep. 388.]

Defective Sidewalk*—Personal Injuries.—Where plaintiff was injured by reason of the falling in of a sidewalk in a city street, which might have occurred from one of several causes, or by the concurrence of either of them, for some of which the city would not have been liable, and there was no evidence from which could have been determined, except from conjecture, what caused the defect, no recovery against the city could be had.

Report from superior court, Suffolk county; John A. Aiken, Judge.

Action by Albert A. Brummett against the city of Boston. The court directed a verdict for defendant, and reported the case. Judgment for defendant.

James J. McCarty, for plaintiff.
Phillip Nichols, for defendant.

HOLMES, C. J. This is an action for personal injuries caused by the sudden falling in of a sidewalk upon which the plaintiff was walking. The question is whether there was any evidence of notice to the city of its dangerous condition. At the trial the judge directed a verdict for the defendant, and reported the case.

There had been some digging and blasting near by for a post for the elevated railway. A trolley wire pole had been moved too near the place. An electric light pole close to the spot had been taken up a month before and the hole filled in, and the same thing had been done later with a hydrant. But whether the soil was disturbed at the precise spot did not appear. Who did the work was not proved except by inference, nor did it appear that the work was done improperly, or, if it was, that the city had notice of the fact. In Bingham v. City of Boston, 161 Mass. 3, 36 N. E. 473, there was such notice. It had been raining hard, and if the rain coupled with the recent disturbances of the soil caused the accident, the city cannot be held.

It would seem more probable that the immediate and active cause was the escape of water, presumably from a water pipe of the city, which was noticed and complained of three or four days before. The water came from the street into the cellar adjoining the sidewalk where the plaintiff fell, and, very likely, undermined it. Upon receipt of the notice men from the water-department took up the pavement in front of the sidewalk and did some work. The flow of the water then stopped. The strongest argument for the plaintiff is that the city, having notice through its water-department of the course of the water, fairly might have been found negligent in not

*See *notes*, 5 Mun. Corp. Cas. 36, 146, 278, 566 *et seq.*; 4 Mun. Corp. Cas. 123; 3 Mun. Corp. Cas. 32; 1 Mun. Corp. Cas. 58.

discovering the supposed effect of the water between the place it repaired and the building.

But apart from other questions (Stoddard v. Inhabitants of Winchester, 157 Mass. 567, 574, 32 N. E. 948) this is pure conjecture. If it were permissible to guess, it is as likely that the earth looked safe at the point where the water-department stopped work as that the person in charge went away leaving a manifestly unsafe place. There is an even chance that the water would not have done any harm but for negligent filling done by a third person and unknown to the city. Even assuming that the probabilities are that the escape of water from a pipe had undermined the sidewalk, the rest of the case is too uncertain to warrant a finding that the defendant was in fault.

Judgment for defendant.

CITY OF COLUMBUS *v.* NEISE.

(*Supreme Court of Kansas, July 6, 1901.*)

[65 Pac. Rep. 643.]

Defective Sidewalk*—Personal Injuries—Sufficiency of Complaint.—Where, in an action for injury resulting from a defective sidewalk, the complaint alleges facts showing that the sidewalk was unsafe and dangerous, it is not necessary to use the words that the sidewalk was unsafe and dangerous.

Same—Same—Liability of City Not Affected by Fact That the Walk Was Wet and Slippery.—Where plaintiff was injured by falling into a hole in a sidewalk without his fault, the liability of the city was not affected by the fact that the walk was rendered more dangerous by being wet and slippery.

Same—Same—Sufficiency of Complaint—Harmless Error.—Where a charge is defective, owing to a word having been evidently omitted in copying it, rendering it meaningless, the error is not ground for reversal, since it could not have prejudiced the jury.

Error from district court, Cherokee county; A. H. Skidmore, Judge.

Action by Samuel Neise against the city of Columbus. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira Heaton and W. R. Cowley, for plaintiff in error.

Blue & Glasse, for defendant in error.

PER CURIAM. This was an action by Samuel Neise to recover from the city of Columbus damages sustained by reason of a defective sidewalk. The petition, which is challenged, stated a cause of action. The principal cause of injury, as alleged, was the opening in the walk; and the further fact stated, that it became more dangerous because of its damp and slippery condition at the time when the accident occurred, does not relieve the city from responsibility for negligently leaving the opening in the walk, where it appears that the injured person is without fault. City of Atchison v. King, 9

*See cross references to Rupp *v.* Howard, *ante*, p. 593.

Kan. 557. The omission in the petition of words to the effect that the sidewalk was unsafe or dangerous is not important, where the facts stated show it to have been in that condition. The testimony is sufficient to sustain the findings and judgment. The defect pointed out by the city in one of the instructions is evidently the result of a clerical error in copying the same. The substitution of the word "unless," or one of similar meaning, makes the instruction intelligible; but, if the instruction was given in the condition in which it appears in the record, it is meaningless, and could not have prejudiced the jury. We find no substantial error in the case, and therefore the judgment will be affirmed.

COLLINS *v.* CITY OF JANESVILLE.

(*Supreme Court of Wisconsin, Aug. 24, 1901.*)

[87 N. W. Rep. 241.]

Personal Injuries—Non-Expert Testimony.—A non-expert witness may testify in an action for personal injuries as to the manner in which plaintiff walked after recovering from the injury.

Same—Defective Sidewalk—Evidence.—In an action for injuries caused by defective sidewalk, evidence that witness knows the place in which it is claimed that plaintiff was injured is immaterial.

Personal Injuries—Expert Testimony.—A physician testified in an action for personal injuries that the fracture of the bone of the leg was accompanied by a strain of ligaments characteristic of a fracture at or near the ankle joint. Another physician testified that he found an abnormal condition of the ligament about the ankle joint and at the upper part of the heel bone. *Held* to authorize expert evidence, on the theory that the injury included a strain of the ligament from the point of the injury to the heel.

Same—Evidence—Improper Ruling.—Where a question propounded to a witness is objected to, and the court believes such objection to be valid, it is improper to rule, on the request of counsel, that such question may be answered at counsel's risk.

Same—Expert Testimony.—Where an expert testifies that on examination of plaintiff he discovered chronic inflammation at a certain joint, a question if there was usually a recovery as to inflammation of the joint within six years, when counsel states, in connection therewith, that he has reference to such a case as that under investigation, is not erroneous, as calling for an opinion as to a matter not based on evidence.

Same—Leading Questions.—A question on direct examination, in an action for injuries alleged to have been caused by a defective sidewalk, asking the witness "if he did not see the accident occur by the plaintiff falling off the fence," is leading.

Same—Refusal to Give Instructions—Harmless Error.—The refusal to give requisite instructions is not erroneous, when they are substantially given in the general charge.

Defective Sidewalk—Child Playing Along the Street a Traveler, When.* —A child going along a sidewalk, and indulging in play, which does not divert her from going straight to her destination, is a traveler, to whom the city owes the duty of keeping its sidewalks in a reasonably safe condition.

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*See *notes*, 5 Mun. Corp. Cas. 572; Reed *v.* City of Madison (Wis.), 17 L. R. A. (briefs) 733.

Collins *v.* City of Janesville

Sidewalk Known to Be Defective*—Burden of Proof as to Negligence.—A person traveling on a sidewalk which he knows to be defective cannot presume that it is in good condition, but a resulting injury will be presumed to have been caused by his negligence, unless a reasonable excuse for forgetting the defects is shown.

Defective Sidewalk—Personal Injuries—Excessive Damages.—Plaintiff sustained a simple fracture of the small bone of the leg near the ankle joint and a strain of the ligaments by reason of a defective sidewalk. She recovered therefrom except for a slight limp, which would not affect her earning capacity. She suffered slightly from her ankle in rainy weather and when standing on her feet all day. There was no disfiguration of the ankle, except a slight thickening of the ligaments and a slight inflammation. *Held*, in an action against the city therefor, that a verdict of $2,800 was excessive.

Same—Same—Same—Decision of Supreme Court as to Excessive Damages Conclusive on Trial Court.—A decision by the supreme court that the damages recovered for a personal injury are excessive is conclusive on the trial court at a subsequent trial of the cause, at which substantially the same evidence is introduced.

Appeal from circuit court, Dane county; Robert G. Siebecker, Judge.

Action by Ann Collins against the city of Janesville for personal injuries alleged to have been caused by a defective sidewalk. From a judgment in favor of plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Action to recover for personal injuries said to have been caused by a defective sidewalk. The defense covered all the material facts alleged in the complaint except the fact that plaintiff received an injury. It was claimed by defendant, among other things, that the injury was caused by a fall from a fence; also that the injury was attributable to contributory negligence on the part of plaintiff. There was evidence to establish the material allegations of the complaint and evidence to go to the jury on the question of where the injury occurred, the nature of it, and the subject of contributory fault on plaintiff's part. The defect in the walk, the nature of the injury and its effect, which the evidence established or tended to establish, were as follows: There was a hole in the sidewalk large enough to admit plaintiff's foot. The hole had existed for a considerable length of time to the knowledge of defendant and plaintiff as well. Plaintiff was traveling on the sidewalk about 8 o'clock in the evening in June, 1895, and while so traveling her foot went into the hole, causing her to fall and break the small bone of her leg a little above the ankle joint; also to strain and injure the ligaments, muscles and tendons of the leg and ankle at or near the point of the fracture. As a result of the injury plaintiff was confined to her bed about a month, was thereafter for about a month obliged to be carried when she moved about, and thereafter for about two and one-half months she was obliged to use a

*See 5 Mun. Corp. Cas. 278, 568; 4 Mun. Corp. Cas. 648 *et seq.*; 2 Mun. Corp. Cas. 27; 1 Mun. Corp. Cas. 490; 2 Mun. Corp. Cas. 675 (negligence of legal custodian imputed to child).

crutch or cane in walking. She suffered considerable pain. The use of the injured limb and foot has been restored except that plaintiff limps slightly, suffers some pain in damp weather, cannot use the limb as freely as formerly in walking up and down stairs or in dancing, the use of the limb by walking or standing for a considerable length of time causes some pain and some swelling of the ankle, and there is some chronic inflammation of the ligaments of the ankle joint and some enlargement of the tissues at that point, causing some tenderness and slight loss of motion of the ankle and foot. Plaintiff was about 14 years of age when she received the injury. The jury found in her favor in the sum of $2,800, for which judgment was rendered with costs.

F. C. Burpee, City Atty., for appellant.
J. J. Cunningham, for respondent.

MARSHALL, J. (after stating the facts). A witness who had observed the manner in which respondent used her foot in walking after she recovered from her injury, so far as recovery had taken place up to the time of the trial, was permitted against objection by appellant's counsel to answer a question as to what she saw regarding such use. That is assigned as error upon the ground that the witness was not an expert. We fail to see anything in the question to suggest that it called for opinion evidence of any kind. The answer that the witness gave was not responsive to the question and possibly was objectionable, but no motion was made to strike it out, so no error can be considered except as to the question itself. It was certainly competent for any one who had seen the girl walk to state how she handled her foot, whether she limped or favored it in any way and that was the sole nature of the information called for by the question objected to.

A witness for plaintiff was permitted to testify that he knew at what place on the walk it was claimed respondent was injured and to state the place. The meaning of the question is not clear. It may have been directed to whether the witness knew where respondent claimed she was injured at or about the time he observed the defect in the sidewalk, or that he knew where she claimed on the trial the injury took place, or that he knew where she was reputed to have received the injury. In either event the evidence does not seem competent. But in view of the other evidence in the case we are not prepared to say it was prejudicial. The better way was to sustain the objection. Whether the witness knew where respondent or any one else claimed she was injured was not material to the case or to the witness's competency to testify in regard to the existence of the defect, which was the real purpose for which he was called.

A physician who testified as an expert was permitted to give his opinion, on the theory that there was evidence in the case tending to prove that respondent's injury included a strain of the ligaments of her limb extending from the place of the bone

fracture down to the heel. As we read the evidence the assumption was well grounded. Dr. Pember, who treated the injured limb, testified that the fracture of the small bone of the leg was accompanied by a straining of the ligaments and other injuries that are characteristic of fractures about or near the ankle joint and also below that point. Dr. Harper testified that upon examination of the girl's foot he found that an abnormal condition of the ligaments existed about the ankle joint and at the upper portion of the heel bone. There is other evidence fully justifying the assumption complained of.

A long and somewhat indefinite question to one of the experts called by respondent was condemned by the court. Nevertheless, on respondent's counsel pressing for permission to have it answered, permission was granted, the circuit judge indicating that he was still of the opinion that the question was so indefinite as to be objectionable, but said that it might be answered at the risk of counsel. In Boltz v. Town of Sullivan, 101 Wis. 608, 77 N. W. 870, this court took occasion to criticise that method of dealing with a judicial question. We reaffirm what was there said. When an objection to evidence is properly made upon a trial it should be considered and the question presented decided according to the right of the matter as the court understands it. It is highly improper to decide such a question regardless of principles of law merely because counsel is willing to take his chances upon the reviewing court upholding his view. Such a decision has no elements in it of judicial determination which appellate courts are created to review. It contains merely the judgment of the favored attorney, though in form it is the judgment of the court. In regard to the question itself we shall not spend much time. In our judgment it might have been made more concise. It is far from being a model, yet we are not prepared to say that it was prejudicially indefinite or that it contained any assumption which could not be referred to evidence in the case which the jury had a right to believe. It was evidently well understood by the witness. In that view we must hold that there was no reversible error committed in permitting it to be answered.

For the purpose of testing the weight that should be given to the evidence of one of the physicians who gave opinion evidence in favor of respondent, and who said that he discovered on an examination of her foot that there was some chronic inflammation in the ankle joint, he was asked if there was usually a recovery as to inflammation in the joint within six years' time, counsel stating, in effect, to the court and the witness, that he was speaking with reference to such a case as the one under investigation. A general objection to the question was sustained upon the ground that it did not call for an opinion based on such a case as the one made by the evidence. That was clearly wrong, because counsel said distinctly that he referred in his question to such a case. The witness should have been permitted to answer.

For the purpose of showing that respondent received her injury by falling from a fence at or about the line of the sidewalk, one of appellant's witnesses was asked a direct question as to whether she did not see the accident happen that way. Upon a general objection thereto the question was ruled out, no reason being assigned therefor. The ruling was proper on the ground that the question was leading.

Several exceptions to refusals to instruct the jury as requested by appellant's counsel are called to our attention. It does not appear necessary to refer to them in detail. All the refused instructions, so far as material, seem to have been given in substance in the general charge.

The court instructed the jury that "if a child, while using the sidewalk in going from one place to another, incidentally indulges in some pastime or play, but is not thereby diverted from going straight to her destination, she is a traveler in the eye of the law, and that if respondent was using the walk in going directly from her home to a neighbor's, as she claims, and at the same time she was accompanied by children who were playing, but she did not stop to play with them, or if she was engaged in any pastime incidentally, but was not thereby diverted from going straight to her destination, she was a traveler." That is claimed to be an erroneous statement of the law. It is clear that the purpose was to instruct the jury in accordance with the rule laid down in Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547, where the court said, in effect, that if a child, in using a sidewalk to go from place to place, incidentally rolls her hoop as she walks along, she is nevertheless a traveler and entitled to the protection of the law as regards the duty of a municipality to keep its sidewalks in a reasonably safe condition. Appellant's counsel says the language of the court was not sufficiently clear to prevent the jury from getting the idea that a child, while journeying upon a sidewalk, may incidentally stop to play without losing her character as a traveler. The reason for that contention is not perceived by the most careful reading of the instruction complained of, especially in view of the fact that following the instruction the court said: "If, on the other hand, you believe and find that she started from her home to her neighbor's and was diverted from this purpose and stopped to play with other children, and she was injured on the sidewalk while engaged in playing, she cannot recover."

The court further instructed the jury that, "Persons walking on a sidewalk have a right to presume that it is in a reasonaby safe condition for travel and the traveler is not called upon to look especially as to whether such walk is in a sufficiently safe condition and properly maintained or not; and so ordinary care on the part of a traveler is presumed upon this ground." It being undisputed that respondent knew of the defect before the accident, that instruction was clearly

erroneous and prejudicially misleading. The same instruction was given upon the former trial, and was condemned in unmistakable language. Collins v. City of Janesville, 107 Wis. 436, 83 N. W. 695. No good reason is perceived why it was repeated. The idea that a person with knowledge of a dangerous defect in a sidewalk can use it regardless thereof, that is, with the presumption that there is no such defect, is erroneous to a high degree. The better way was to omit the instruction. Having given it, the court should have stated that it did not apply to the facts of this case because respondent knew of the defect; that such circumstance displaced the presumption that would otherwise exist in her favor and required some evidence, direct or circumstantial, reasonably sufficient to overcome the presumption of negligence raised by such knowledge, by showing that she was proceeding upon the walk paying attention to the necessity of avoiding the danger, or that she forgot the existence of it and that her forgetfulness under the circumstances was consistent with ordinary care. Some courts have held that if a person knows of a dangerous defect in a sidewalk he is bound at his peril to remember it. Gilman v. Inhabitants of Deerfield, 15 Gray, 577; Bruker v. Town of Covington, 69 Ind. 35, 35 Am. Rep. 202. But this court, in harmony with the weight of authority, holds to the more reasonable and humane rule that a person may forget the existence of a defect in a street or sidewalk and thereby receive a personal injury, and yet be in the exercise of ordinary care. Cuthbert v. City of Appleton, 24 Wis. 383; Wheeler v. Town of Westport, 30 Wis. 392; Simonds v. City of Baraboo, 93 Wis. 40, 67 N. W. 40; Crites v. City of New Richmond, 98 Wis. 55, 73 N. W. 322. An examination of those cases will show that the law is that if a person knows of a dangerous defect in a sidewalk and is injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent, but that the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of the plaintiff's contributory negligence. In Wheeler v. Town of Westport there was proof that the injury happened on a dark night and that the injured person was a physician on his way to attend a patient; that he was familiar with the defect, but was engaged in conversation with the messenger who summoned him, by reason whereof, in momentary forgetfulness of the known danger, he collided with it. Under those circumstances it was held that the jury were justified in saying that the failure to remember was consistent with ordinary care. In Crites v. City of New Richmond, the proof was that as the injured person was traveling upon the sidewalk an acquaintance called to him from the opposite side of the street; that his attention was thereby diverted from the walk upon which he was traveling,

by reason whereof he stepped into a hole in the walk, with which he was familiar, and which was in plain sight, and was injured. In Cumisky v. City of Kenosha, 87 Wis. 286, 58 N. W. 395, plaintiff fell over a dangerous ridge of ice on a sidewalk. She knew of the obstruction and had passed over it but a few hours before. When the accident happened she was hurrying along to avoid meeting a large number of workmen who had just stopped work for the day and were about to leave the shop to go to their homes. She was a nervous, timid woman. The desire to avoid meeting the men engrossed her thoughts and diverted her attention from the walk. Just before arriving at the obstruction she looked in the direction of the men to see if they were coming. Such circumstances were deemed sufficient to carry the case to the jury, notwithstanding the woman's knowledge of the dangerous condition of the walk. "Such facts and circumstances," said the court, "have often been held by this court to destroy the effect of the plaintiff's previous knowledge of the defect as the ground of contributory negligence, and repel the presumption of negligence from the plaintiff's previous notice and knowledge of the obstruction, and that the jury might properly so consider them." Enough has been said to demonstrate clearly the erroneous character of the instruction above considered. We might have rested the decision in regard thereto on what was said upon the former appeal. In view of that decision, as before indicated, the instruction should not have been repeated. Probably the trial court supposed that it was rendered harmless by coupling with it an instruction to the effect that if a person knows of a dangerous defect in a sidewalk he must use greater care than if he is ignorant thereof. Counsel for respondent seeks to sustain the instruction on that theory. The added statement left unimpaired the erroneous instruction, for the jury were still left to be guided by the idea that, notwithstanding respondent's knowledge of the defect, she yet had a right to presume that the walk was in a reasonably safe condition for her use and to recover without any evidence whatever to excuse her for not remembering and avoiding it.

On the former appeal a verdict of $1,700 was held excessive. Counsel for appellant, by reference to that, insist that the present judgment of $2,800 for damages must be reversed. To sustain it, the claim is made that the evidence in the record before us is substantially different from that formerly reviewed. A careful reading and comparison of the evidence in the two records fails to sustain that view. The evidence of respondent on the last trial is substantially identical with that given by her before. More evidence was given on the last trial corroborative of her testimony than was given before, but that does not count for much, as the former decision was made upon the theory that the jury had a right to believe the plaintiff's story as to the effect of the injury, to its fullest extent. A greater number of experts were sworn on the last

trial than on the trial which preceded it, but the increase upon the one side was balanced by a corresponding increase upon the other. The nature of the expert evidence is substantially as before. On the whole the situation in this: Respondent suffered a simple fracture of the small bone of the left leg near the ankle joint, with a straining of the ligaments necessarily characteristic of such an injury. There was a recovery from the injury in the usual course of events so that respondent has regained the full use of her limb except as to some slight impairment that does not and will not seriously interfere with her power to earn money and take care of herself or with her comfort and enjoyment. She has a slight limp, not easily perceptible unless one's attention is called particularly to it. She has some pain at times in the region of the ankle joint in damp or rainy weather, but none of any serious nature. The same is true in case she stands on her feet all day. There is a tendency of the joint to swell on such occasions. She experiences no difficulty with her foot otherwise than as stated, except when she steps backward. Then there is a slight drawing of the muscles around the ankle. There is no evidence of the injury now that can be readily discovered by merely observing the foot and limb at and near the fracture and by comparing them with the other foot and limb, though there is some thickening of the ligaments and some chronic inflammation in the joint, such as is liable to exist in such cases. The clear weight of the expert testimony is to the effect that the girl now has and will continue to have substantially the full use of her foot, though some tenderness and weakness has been and will be experienced in damp weather, when the foot is subjected to hard usage, and slightly at other times. For the injury thus described the jury gives a verdict equivalent to an annuity of $200 per year for the full period of the girl's expectancy of life. If, under any circumstances, such a recovery could be sustained, it cannot in this case in view of the former decision. A decision as to the amount of damages recoverable on a given state of facts in a particular case, when once rendered in this court, is res adjudicata and absolutely controlling in such case the same as a decision upon any other question. A verdict for more than the amount once held erroneous because excessive cannot thereafter be held good upon the same or substantially the same evidence because sanctioned by a second or any number of juries. Otherwise all that would be necessary to secure the success of a perverse verdict would be to have the mischief of it sanctioned by a second jury.

The judgment of the circuit court is reversed and the cause remanded for a new trial.

WILKINS *v.* CITY OF FLINT.

(*Supreme Court of Michigan, Sept. 25, 1901.*)

[87 N. W. Rep. 195.]

Defective Sidewalk—Personal Injuries—Whether Sidewalk Reasonably Safe a Question for the Jury.—Where plaintiff was injured on a sidewalk made of planks laid on four-inch stringers, some of which had been removed, by stepping off the plank unexpectedly, and going down four to six inches, the question whether the walk was reasonably safe was properly submitted to the jury.

Presentation of Claim*—Sufficiency of Same.—A notice and claim for injuries received on a defective sidewalk, which stated the specific injuries developed at that time, and the damages claimed, was sufficient without itemizing the damages for each.

Permanent Injuries—Admission of Mortality Tables in Evidence.—Where, in an action for permanent injuries, the fact that the plaintiff was not of average health was disputed, the mortality tables were properly admitted in evidence, to be used or not by the jury, according to their conclusion on the question of fact.

Defective Sidewalk—Notice of Defective Condition a Question for the Jury.—Where, in an action for injuries received on a defective sidewalk, it was shown that the walk was inspected ten days before the accident, but there was proof that it had been out of repair for three weeks, and that the inspector was informed of it during the time, the question whether the city had notice of the defect was properly submitted to the jury.

Evidence—On Redirect Examination Witness May Be Questioned as to Conversation Brought Out on Cross-Examination.—In an action for injuries received on a defective sidewalk, the testimony of plaintiff's companion that plaintiff stated she was not thinking of the condition of the walk at the time of the accident was admissible where brought out on redirect examination as a part of a conversation drawn out on cross-examination.

Evidence—Harmless Error.—The rejection of certain evidence was harmless error where the same was given without objection on a repetition of the question.

Action for Personal Injuries—Argument of Counsel—Comments Not Improper.—Where, in an action for injuries received on a defective sidewalk, the plaintiff's counsel, in commenting on the fact that the defendant had not introduced as witnesses two doctors who had examined plaintiff, said the city did not dare to put them on the stand, the argument will not be deemed improper.

Same—Same—Same—Harmless Error.—Where plaintiff's counsel, in an action for injuries, in the course of argument urged the jury to either do justice by the plaintiff "or send her to the county house at once," the argument, though improper, will not constitute reversible error, having been invited by the comment of defendant's counsel.

Error to circuit court, Genesee county; Charles H. Wisner, Judge.

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*See Harvey *v.* City of Clarinda, 4 Mun. Corp. Cas. 66; Engstrom *v.* Minneapolis, 3 Mun. Corp. Cas. 34, and cross references; City of Guthrie *v.* Harvey Lumber Co., 3 Mun. Corp. Cas. 240; Roberts *v.* Village of St. James, 2 Mun. Corp. Cas. 331; Bacon *v.* City of Antigo, 2 Mun. Corp. Cas. 512; Frost *v.* City of Casselton, 2 Mun. Corp. Cas. 521; Seamons *et ux. v.* Fitts, Town Treasurer, 1 Mun. Corp. Cas. 465, and *note*, 478; Shields *v.* Town of Durham, 118 N. C. 450, 36 L. R. A. 293; Reed *v.* City of Madison (Wis.), 17 L. R. A. 733; City of Hastings *v.* Foxworthy, 45 Neb. 676, 34 L. R. A. 321; Dundas *v.* City of Lansing (Mich.), 5 L. R. A. 143; *note*, 10 L. R. A. 739.

Wilkins *v.* City of Flint

Action by Rebecca Wilkins against the city of Flint, a municipal corporation. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Daniel Heims (Ed. S. Lee, of counsel), for appellant.
Everett L. Bray, for appellee.

HOOKER, J. The defendant has appealed from a judgment of $8,000 in favor of a woman who claims to have received severe and permanent injuries from a fall upon a defective sidewalk. The sidewalk was of plank laid upon four-inch stringers, and it is plaintiff's claim that the plank had been removed for a space of some feet, and that while walking upon the walk, the night being dark, she stepped off from the plank unexpectedly, going down from four to six inches, and that, turning her ankle, she fell upon the ground, and is now bedridden with paralysis, from which it is unlikely that she will ever recover, as a consequence. It is claimed by the defense that the walk was reasonably safe, and that the court should have so instructed the jury, under the rule in the case of Shietart v. City of Detroit, 108 Mich. 309, 66 N. W. 221. We are of the opinion that the case of Williams v. City of West Bay City (Mich.) 85 N. W. 458, justifies the course taken of submitting the question to the jury.

It is next contended that the notice and claim filed with the common council did not conform to the requirements of the law. Among other defects alleged, is that the claim was not itemized. We think the notice was quite definite, and that the statement of all of the specific injuries that had then developed was sufficient. It was unnecessary to attach to each an aliquot part of the damages claimed. This case presents no new features relating to the subject of statutory notice that would be of interest, and we omit further reference to the particulars of the notice.

It was claimed that the injury was permanent, and, after some evidence to that effect had been heard, the mortality tables were introduced, against the general objection that they were incompetent and immaterial. It is now claimed that the plaintiff was not a woman of average health at the time of the accident, and that the table should have been excluded, under the authority of Denman v. Johnston, 85 Mich. 387, 48 N. W. 565. Had the fact that she was not an ordinarily healthy person been admitted or undisputed, the tables would have had no bearing, but, being disputed, they were admissible, to be used or not by the jury, according to their conclusion upon the question of fact.

As the only assignments of error relating to the charge are based upon refusals to give certain requests, we assume that the charge of the court upon this subject was correct.

It was shown that the walk was inspected some ten days before the accident, but there was proof that it had been out of repair for three weeks, and that the inspector was informed

of it during the time. It was, therefore, competent to leave the question of notice to the jury.

Error is assigned upon the admission of the testimony of plaintiff's companion that on her way home she said that she was not thinking of the condition of the walk; but this was upon redirect examination, and a part of a conversation drawn out upon her cross-examination.

Error is assigned upon the alleged exclusion of the testimony of Murphey in relation to the condition of the walk on the morning after the accident, but the record shows that the testimony was given without objection on a repetition of the question.

Error was assigned upon the following remarks of counsel: "The city has refused to put these two doctors on the stand, Dr. Burr and Dr. Campbell. We have asked them to do it, and they have not offered to do it. They dare not do it, because their mouths would be closed against the facts that this girl had been injured. They dare not put Dr. Burr and Dr. Campbell on the stand." By Mr. Bray: "But, gentlemen of the jury, if by any mischance you should not be able to do justice by her, then, gentlemen, I beg of you not to let injustice take the form of another disagreement. Either make the city of Flint do what is right by this girl, or send her to the county house at once." It is claimed that these remarks were not excepted to, but the record shows otherwise. The record shows that they were not consecutive. The allusion to Drs. Burr and Campbell was followed by an exception, when Mr. Hiems, counsel for defendant, said: "Now, gentlemen of the jury, Mr. Bray will tell you that, unless you render a judgment in favor of the plaintiff, she will have to go to the poor house. Be that as it may, if she has to go to the poor house, the city of Flint will pay its portion of the expense." The counsel for the plaintiff is accused of making a somewhat pathetic appeal for sympathy to the jury, which contained the remainder of the language excepted to. The remarks relating to Drs. Burr and Campbell were, perhaps, justified by the case of Vergin v. City of Saginaw (Mich.) 84 N. W. 1075. The other language is similar to that used in the case of Leach v. Railway (Mich.) 84 N. W. 316, decided after this cause was tried, and should have been omitted. We are reluctant to disturb a judgment in a case that was well and fairly tried, unless there has been manifest injustice, which does not appear; and, as the remark was invited by the comment of defendant's counsel, we think this point should not, alone, reverse the case.

Several questions of minor importance are presented, but an examination of them has satisfied us that there is no error. The judgment is affirmed. The other justices concurred.

PARMENTER *v.* CITY OF MARION.

(*Supreme Court of Iowa, Feb. 7, 1901.*)

[85 N. W. Rep. 90.]

Care and Control of City Streets—Duty of Municipality to Keep in Repair—Construction of Code.—Under Code, § 753, providing that cities and towns shall have the care and control of all public highways and streets, and shall cause the same to be kept open and in repair and free from nuisance, an action against a city for injuries received on its sidewalks will lie, since it imposes a mandatory and not a discretionary duty on municipalities, of keeping the streets in repair and free from nuisances and obstructions.

Platform on a Level with the Second Story of a Building, and Projecting over the Sidewalk*—Not a Nuisance Per Se.—A platform slightly narrower than the sidewalk projected out over the sidewalk, on a level with the second floor of an abutting building. The building was used to store baled hay and straw, and the platform was used in unloading and loading the bales from wagons in the street below. *Held*, that the platform was not a nuisance and an obstruction in itself, so as to impose a liability on the city for permitting it to remain and be used for the purpose indicated, since the municipality had a right to presume that it would be properly used.

Same—Personal Injuries—Notice of Improper Use.—A platform slightly narrower than the sidewalk projected out from the second story of an abutting building, above the sidewalk. The platform was used in loading and unloading bales of hay and straw from wagons in the street, and sometimes the bales were thrown from the platform into the street, but only once before had a bale fallen on the sidewalk. *Held* insufficient to sustain a finding that the municipality had knowledge of the improper use of the platform, and hence the city was not liable for the injuries received by a bale of hay falling from the platform onto a person passing along the sidewalk.

Same—Same—Proximate Cause.—Plaintiff was injured while passing along the sidewalk under a platform projecting from the second story of a building, by a bale of hay being pushed off of the platform into the street below by the occupant of the premises, who did not look to see whether any one was on the walk below, before pushing off the bale but who yelled, "look out below." At the time the wind was very strong, and blew against the front of the building. *Held*, in an action against the city for the damage sustained, that, if the platform and its use were an obstruction in the street, the negligence of the occupant of the building was the proximate cause of the injury, and that the platform was a mere condition, and hence a directed verdict for the defendant was improperly refused.

Same—Same—Instructions.—Where plaintiff was injured by a bale of hay falling off of a platform which was built above, and slightly narrower than, the sidewalk, and which was used for loading and unloading hay, and was not used for storage purposes, an instruction, in an action against the municipality, that, if the defendant permitted the platform to be so constructed that objects falling therefrom would be likely to fall on people passing by, defendant would be liable, was erroneous, as assuming that there was evidence tending to show that objects were left thereon which were liable to fall on passers-by.

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*Overhanging Structures.—As to awnings, see Hibbard, Spencer, Bartlett & Co. *v.* Chicago, 173 Ill. 91; State *v.* Clarke (Conn.), 39 L. R. A. 670; Augusta *v.* Burum (Ga.), 26 L. R. A. 340, and *note*; Riley *v.* Simpson (Cal.), 7 L. R. A. 622. As to signboards, see State *v.* Higgs (N. Car.), 48 L. R. A. 446. As to bay windows, see State *v.* Kean (N. H.), 48 L. R. A. 102; Attorney General *v.* Algonquin Club (Mass.), 11 L. R. A. 500 (provision in deed). See generally, *note* to Hagerstown *v.* Witmer (Md.), 39 L. R. A. 667 *et seq.*

Parmenter *v.* City of Marion

Appeal from superior court of Cedar Rapids; T. M. Giberson, Judge.

Action at law to recover damages for injuries received by plaintiff while passing along one of the streets of defendant city. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Reversed.

C. J. Haas and Giffen & Voris, for appellant.

Rickel, Crocker & Christie, for appellee.

DEEMER, J. This case involves the difficult and perplexing problem of proximate care. It appears that plaintiff, while passing along one of the streets of defendant city, was injured by being struck with a bale of hay that was thrown out of the second story of a building occupied by one John R. Rheinheimer. The building abuts on the street. In front of it is a sidewalk, the outer edge of which is 6 feet and 5 inches from the outside wall. Over the sidewalk, and projecting out from a level with the second floor, is a platform 15 feet in length and 5 feet wide. The bottom of this platform is 8 feet and 6 inches above the sidewalk. The sidewalk and street itself were free of obstructions, except as stated. Rheinheimer was dealing in baled hay and straw, and used the upper story of the building as a storeroom. On the day that plaintiff received her injuries, Rheinheimer went to the second floor of his building to procure a bale of hay. It was a cold winter day, and a strong wind was blowing from the northwest, towards the front of the building. Rheinheimer pulled the bale from its place, dragged it to the door opening onto the platform, opened the door, stepped to the edge of the platform, at the same time saying, "Look out below," and, giving the bale a push with hand and knees, threw it over the platform. In its descent it struck plaintiff, who was walking on the sidewalk underneath the platform. The negligence charged is that defendant permitted the platform to be constructed and maintained in such a manner that objects falling therefrom were likely to fall upon and injure passers-by, and permitted the owner to use the same for the purpose of loading and unloading hay and straw into and from the building, to the danger of those using the sidewalk and street in front of the building, without taking any steps to remove or prevent the same.

The defendant's liability must be predicated on section 753 of the Code, as follows: "They shall have the care, supervision and control of all public highways and streets, * * * and shall cause the same to be kept open and in repair and free from nuisances." But for this section, there would be no liability. It is a general rule that, in the absence of statute, no action lies against a quasi municipal corporation for breach of a corporate duty. In this state it is held that the duty of keeping streets in repair and free from nuisance is not discretionary, and that a city is liable for damages resulting

from an injury caused by failure to observe the mandate of the law. Collins v. City of Council Bluffs, 32 Iowa, 324; Rowell v. Williams, 29 Iowa, 210. What, then, was the duty of the city? Manifestly, to keep its streets in repair, free from nuisance, and in a reasonably safe condition for public travel. The platform built out from the second story of the building in no way impeded public travel. In itself, it was not a menace to persons using the street. There was no danger of its falling on the public, in any way injuring it. Had it been used as a place for storing bales of hay that were liable to fall off and injure the public, by reason of its being narrower than the sidewalk below, and this condition were known to the city, or ought to have been known in the exercise of reasonable care and diligence, there would have been a liability on the part of the city. But that is not the case before us. Here the plaintiff was injured by reason of the carelessness and negligence of Rheinheimer in throwing the bale of hay from the second story to the sidewalk. The accident was just as likely to happen in the absence of a platform as with it. The platform, in itself, was not a nuisance or an obstruction to travel; and no one had reason to suppose that the owner of the building would push bales of hay out to the edge thereof, and allow them to drop on passers-by. They could as well anticipate that the owner of any building with more than one story is likely to carelessly throw objects out of the doors and windows thereof, and injure passers-by. Had the platform itself been a nuisance to persons using the street, it may be that the mere fact that Rheinheimer's negligence concurred with that of the city in producing the wrong would be no defense; for it is well settled that the mere fact that some other cause operates with the negligence of the defendant to produce the injury complained of does not relieve the defendant of liability. His original wrong, concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether that other cause was one for which the defendant was responsible or not. Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697, and cases cited. But, before this rule will apply, it must be found that the defendant was itself negligent, and that but for its negligence the accident would not have happened. Negligence is not a proximate cause, unless it be found that the injury would not have happened but for that negligence. Campbell v. City of Stillwater, 32 Minn. 308, 20 N. W. 320. There was no negligence in allowing the platform to remain in the condition in which it was constructed. Danger could only be apprehended from the improper use thereof, and, unless the defendant had or ought to have had notice of this use, it was guilty of no negligence. An accident is distinguishable from a case of negligence in this: that the former is an unusual result,—one which reasonable and careful human foresight could not have apprehended, and which, under the circum-

stances, such care and foresight could not have guarded against. Handelun v. Railway Co., 72 Iowa, 709, 32 N. W. 4; Crowley v. Railroad Co., 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918. Defendant was not bound to anticipate the negligent act of a third party, and it seems clear to us that there was no negligence in simply permitting the platform to remain in the condition it was in. What, then, was the act that caused the injury? Manifestly, the negligent act of Rheinheimer in throwing the bale of hay to the sidewalk, along which people had the right to pass, without looking to see if any one was coming who might be struck by the descending hay. The platform was a condition, and not a cause of the accident. If it had been wider, perhaps, the injury would not have happened; but, in the condition it was in, it was not of itself dangerous. In all the cases relied on by appellee, the defendant was negligent, and his negligence concurred in producing the injury. The mere fact that Rheinheimer used the platform for loading and unloading hay would not make it dangerous. Nor would the fact that he had theretofore thrown bundles from this platform into the street give the city notice that he was likely at some time to push one off the edge of the platform that would be carried by the wind back onto a passer-by. Properly used, the platform was not a menace to any one. The evidence tends to show that, while Rheinheimer sometimes threw baled hay from the platform into the street, he never but once before so threw it that it landed on the sidewalk. True, he frequently used it in loading and unloading wagons, which in itself was not dangerous, and, no doubt, could not be prohibited by the city; but he rarely threw bales down onto the street, and but once so threw them as to strike on the sidewalk. With proper care on his part, there was no danger to passers-by; and the city, in the absence of notice to the contrary, had the right to assume that he would use that degree of care. Such notice as it had of the use was not sufficient to charge it with knowledge that he was making a nuisance of the place, and was likely to injure passers-by.

But, if we assume that the city was negligent in allowing the platform to remain in the manner shown, it by no means follows that it is liable to the plaintiff. It must also appear that this negligence contributed proximately to produce the injury. The general rule as to concurring causes has already been stated, and it appears therefrom that, to hold defendant responsible, it must appear that his negligence was one of the direct and proximate causes of the injury. Judge Cooley states, in his work on Torts, the rule of proximate cause very clearly, and we embody his statement found on pages 76 and 77 as the doctrine of this opinion. He says: "If an injury has resulted in consequence of a certain act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or prox-

imate cause, and refuse to trace it to that which was the more remote. Cooley, Torts (2d Ed.) p. 73. "If the original wrong only becomes injurious in consequence of the intervention of some distinct and wrongful act or omission by another, the injury shall be imputed to the last wrong, as the proximate cause, and not to that which was more remote." When there is an intervening cause between defendant's negligence and plaintiff's injury, the rule relieving the defendant from responsibility seems to be that this intervening cause must be either a superseding or a responsible one. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of defendant's negligence that it alone, without his negligence contributing in the slightest degree, produces the injury. It is a responsible one if it is the culpable act of a human being who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury when the connection is thus actually broken by a responsible cause. Shear. & R. Neg. (1st Ed.) § 32. In applying this rule, or exception, it may be, to concurring cause, it is very generally held that, even if there be negligence in some degree on the part of the defendant, still it cannot ordinarily be said to be the proximate cause of an injury, when the negligence of another human agency has intervened and directly inflicted the injury. Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1076; Lewis v. Railway Co., 54 Mich. 55, 19 N. W. 744; De Camp v. City of Sioux City, 74 Iowa, 392, 37 N. W. 971; Cuff v. Railroad Co., 35 N. J. Law, 32; Selleck v. Railway Co., 58 Mich. 195, 24 N. W. 774; McClain v. Incorporated Town of Garden Grove, 83 Iowa, 235, 48 N. W. 1031; Neilson v. Gilbert, 69 Iowa, 691, 23 N. W. 666; Liming v. Railroad Co., 81 Iowa, 246, 47 N. W. 66; Ward v. Railroad Co., 97 Iowa, 50, 65 N. W. 999. With possibly one exception, all our cases may be harmonized in accord with the two rules above announced; that is, the one quoted from the Gould Case, and the one from Shear. & R. Neg. In Stanley v. City of Davenport, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, the city was held liable because it allowed a steam motor to be used on its streets, that allowed steam to escape and frighten plaintiff's horses. The question of proximate cause was not involved or decided. Under the issues in that case, there was no question of defendant's liability. In Rowell v. Williams, 29 Iowa, 210, there was an open and notorious obstruction of the street, created by a third party, it is true; but the defect in the street was unquestionably the proximate cause of the injury. In Cason v. City of Ottumwa, 102 Iowa, 99, 71 N. W. 192, an unfastened billboard resting against the side of a building blew over on plaintiff; and the city was held responsible and liable because it was negligent in allowing the billboard to remain in the condition in which it was found, as it endangered travel. No culpable human agency intervened between defendant's negligence and

the resulting injury. In Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697, the negligence of defendant was proved, and the intervening cause was one for which no human being was responsible. Moreover, this intervening cause did not of itself produce the injury. The same may be said of Langhammer v. City of Manchester, 99 Iowa, 295, 68 N. W. 688; Pratt v. Railway Co., 107 Iowa, 287, 77 N. W. 1064; Harvey v. City of Clarinda (Iowa) 82 N. W. 994; Walrod v. Webster Co. (Iowa) 81 N. W. 598. In the Garden Grove Case it was held that the town was under no obligation to provide its bridges with railings that would resist the weight of a horse precipitated suddenly against it, and that under the facts of that case the condition of the railing and the narrowness of the bridge were not the proximate cause of the injury. In De Camp v. City of Sioux City, 74 Iowa, 392, 37 N. W. 971, there was a responsible intervening cause, and the city was held not liable. In Knapp v. Railroad Co., 65 Iowa, 94, 21 N. W. 198, there was an irresponsible agency intervening; but plaintiff was allowed to recover on the theory that defendant's negligence was the proximate cause, following the Squib Case (Scott v. Shepherd) 2 W. Bl. 892. What is said in that case about concurring cause is purely dictum, and really at variance with the final conclusion reached. Chief Justice Shaw's definition of "proximate cause" and "concurring negligence," quoted in that opinion, has been quite generallly disapproved. In Langhammer v. City of Manchester, 99 Iowa, 295, 68 N. W. 688, there were two causes contributing to the injury, for one of which, only, defendant was responsible. We approved an instruction to the effect that plaintiff might recover in case of concurring cause if he showed that the injury would not have happened but for defendant's negligence. In that case there was a coating of ice on a slanting sidewalk, resulting from a storm the night before plaintiff received her injuries. Bliven v. City of Sioux City, 85 Iowa, 346, 52 N. W. 246, was another billboard case, and the intervening cause was not a responsible one. We will not take the time or space needed to refer to other cases. They may all be harmonized by applying the rules heretofore announced.

To avoid misunderstanding, it is well perhaps to state in a brief way our conclusions, as follows: (1) The platform itself was neither a nuisance nor an obstruction. (2) If properly used, as defendant had the right to suppose it would be, its use did not make it a nuisance. (3) If improperly used, in such a manner as to make it a nuisance, the city was not responsible until it had, or ought to have had, notice or knowledge of its improper use. (4) If the platform was an obstruction or nuisance, still, as Rheinheimer's act was manifestly a negligent one, for which he alone is responsible, the connection between defendant's wrong and the injury was broken, and Rheinheimer's wrong, under the facts shown, became the proximate and efficient cause. The platform under such

circumstances was a mere condition, and the accident was as likely to follow without the platform as with it. It should also be constantly borne in mind that there is no evidence to show that Rheinheimer so used the platform as to make a nuisance thereof. He had the right to back wagons up to his building for the purpose of loading and unloading them, provided he did not obstruct travel for an unreasonable length of time, and did nothing to unreasonably endanger passers-by. So long as he used the platform for loading and unloading wagons backed up or under it, he was doing no wrong. He could not, of course, use the platform as a place of storage; and if he placed bales thereon, that were likely to fall and injure passers-by, with the knowledge of the city, the city would, no doubt, be responsible. It may be (although we do not decide the point) that if he (Rheinheimer) persistently or continuously threw bales of hay from the second story of his building to the sidewalk below, with the knowledge, express or implied, of the city, and thereby endangered the safety of persons using the streets, and the city failed to use reasonable care to stop this dangerous use, it would be liable. But the facts do not justify the conclusion that the city had knowledge of the dangerous use of the platform. But once before, if at all, was this platform used in such a manner as to endanger the safety of those using the sidewalk. We doubt very much if the city could have interfered with the use of the platform as a place for loading or unloading hay, but, however this may be, it was not bound for any negligent or improper use thereof unless it had, or ought to have had, notice or knowledge thereof, and an opportunity to prevent the same. There was not sufficient evidence to justify the jury in finding that it was so used as to be a nuisance, or that, if so used, the city had notice or knowledge thereof. For these reasons the defendant's motion for a directed verdict at the conclusion of plaintiff's evidence should have been sustained.

2. The trial court instructed the jury as follows: "You are instructed that it was the duty of the defendant to keep the street and sidewalk where the accident occurred in a reasonably safe condition for pedestrians passing along the same, and free from obstructions. As applied to this case, if you find from the evidence that the defendant negligently suffered and permitted a platform to be constructed from the second story of a building upon said street in such a manner that the same projected over a portion of the sidewalk, *so that objects falling therefrom would be likely to fall upon the heads of passers-by, and that the defendant suffered and permitted the owner or occupant of such building to keep up and maintain the same in such condition, and also to use the same for the purpose of loading and unloading baled hay and straw, or to pass the same in or out of the building*, and that in so doing the same was thrown from said platform upon said sidewalk,

or a portion thereof, in such a manner as to endanger pedestrians passing along said sidewalk in the exercise of ordinary care, and constituted an obstruction to said sidewalk, and that such condition and use had continued for a long time prior to the injury to the plaintiff, and that the condition of said platform and its construction and use was public, and of such character, and had continued for such a length of time prior to the injury, that the defendant, in the exercise of ordinary care, would have known of such construction and use, and have prevented its continuance, before the time of the plaintiff's injury, and that while the plaintiff was passing along said sidewalk, using ordinary care, a bale of hay was dropped from said platform, and that the same fell upon the plaintiff and injured her, then and in that event your verdict should be for the plaintiff." The whole of the instruction, and particularly that part italicized, is made the basis of an assignment of error. For the reasons already pointed out, we think it was erroneous. It was also erroneous for the reason that it assumes there was evidence tending to show that objects were used or kept thereon that were likely to fall on the heads of passers-by. Again, the use of the same for the purpose of loading and unloading hay, or for passing the same in or out of the building, did not of itself render it a nuisance.

Other questions are discussed, that we will not consider, for the reason that the foregoing seems to dispose of the case. Reversed.

CRAWFORD *v.* MAYOR, ETC., OF CITY OF GRIFFIN.

(*Supreme Court of Georgia, May 23, 1901.*)

[38 S. E. Rep. 988.]

Personal Injuries—Liability of City for Private Bridge.*—Where, upon the trial of an action for damages against a city for physical injuries alleged to have been caused by a defective bridge, it appeared from the evidence submitted in behalf of the plaintiff that the bridge in question extended from the street to the sidewalk over a drainage ditch, not at a regular public crossing or street intersection, and was built solely for the convenience of an owner of abutting land, and was not in general use by the public, and was of no public utility, *held*, that the granting of a nonsuit was proper, although it further appeared that prior to the plaintiff's injuries the city, after taking up the bridge for the purpose of deepening the ditch, had replaced the same, and had subsequently made some repairs upon it, and that some of the public used it.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Action by Martha Crawford against the mayor and city council of the city of Griffin. At the close of plaintiff's case a nonsuit was granted, and both parties bring error. Affirmed.

Searcy & Boyd and Marcus W. Beck, for plaintiff.

Lloyd Cleveland, for defendants.

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*See Mayor, etc., of Sandersville *v.* Hurst, 4 Mun. Corp. Cas. 230, and cross-reference *note*.

Crawford *v.* Mayor, etc., of City of Griffin

FISH, J. Martha Crawford sued the mayor and council of the city of Griffin for damages for personal injuries alleged to have been received by her by reason of the breaking of a rotten plank in a bridge over which she was walking in such city. The court granted a nonsuit, to which ruling the plaintiff excepted. From the evidence submitted in her behalf, it appeared that the bridge in question was not situated at a public crossing, nor at the intersection of streets, but was located opposite the garden gate of Mr. Mills, and extended from the street to the sidewalk over a gutter or ditch for drainage, and was built solely for the convenience of Mr. Mills in hauling manure into his garden. He furnished a part of the lumber for the construction of the bridge, but it did not appear who built it or caused it to be built. Some four or five years after its erection it became necessary to deepen the ditch under the bridge for drainage purposes, and to do this the bridge was removed by the hands working the streets of the city, and, when the ditch had been deepened, was replaced in its original position by such hands. It appeared that the street hands subsequently repaired the bridge, but how often or in what manner was not shown. Plaintiff was a servant of Mills, and in going to his house she left the sidewalk on the opposite side of the street, some 40 or 50 feet below the bridge where she was hurt, and followed a path leading diagonally across the street to the bridge, and while walking over it one of the planks thereon, which was rotten, broke, causing her to fall and to fracture her leg. The plaintiff testified: "I have seen people cross the bridge. There was a path going across the bridge. * * * It was a path that people walked across the bridge from the sidewalk to the street. I have seen people walk across there. * * * It was my regular way of passing. * * * As to persons who cross that bridge, I saw Clara Baker and Tena cross there. They came over there often. I don't know how often they crossed it. They work often at Mr. Mills'. They cross frequently. I saw the Hardaman girl, Mrs. Mills' chambermaid, cross there. I have seen others. I thought it was a regular crossing. I have seen people passing it all the while. * * * More use it than those who come from Mr. Mills' house, whether it was a public crossing or not. They used it anyway. * * * They used it as a public crossing. It is in the public street. The bridge is across a gully between the sidewalk and the street." Plaintiff proved her earning capacity before and after her injury, her age, and that she suffered much physical pain.

Under the proof submitted, there was no error in granting a nonsuit. A city is not bound to maintain bridges across gutters and drainage ditches running along the edges of sidewalks, except at regular public crossings or the intersection of streets. Elliott, Rords & S. (2d Ed.) § 621 ; McCarthy v. Corporation of Village of Oshawa, 19 U. C. Q. B. 245. "The

general use of a bridge by the public as a part of the common highway, and its public utility, are necessary, to constitute it a public bridge." 4 Am. & Eng. Enc. Law (2d Ed.) 920. The bridge in question was not at a regular public crossing, nor at the intersection of streets. It was no part of the street or sidewalk, nor was it shown to be in general use as such, or of any public utility. It was a mere private bridge, built solely for the convenience of an individual. It was not shown that the city had built it. The mere fact that the city took it up and replaced it, and made some repairs upon it, did not constitute it a public bridge. The city being under no duty to keep up the bridge, its failure to do so was not negligence, and the plaintiff could not recover. The cases cited by plaintiff in error are not in point. In Mayor, etc., v. Dodd, 58 Ga. 238, the record shows that the ditch was across a sidewalk, and the bridge a part of the sidewalk. In Town of Belton v. Vinton, 73 Ga. 99, the bridge was over a gully running across the street, and formed part of the public street. In Mayor, etc., v. Johnson, 84 Ga. 279, 10 S. E. 719, the bridge through which the plaintiff fell was on a public sidewalk, and consequently a part thereof. Bentley v. City of Atlanta, 92 Ga. 623, 18 S. E. 1013, was an action against the city for permitting a railway company to erect a bridge at a street crossing, and to maintain it, together with the approaches thereto, in such a manner as to render the same a public nuisance. The court held that under such circumstances the city would be liable for the consequences, just as it would if the improper work had been done by the city itself. We think it quite clear that the judgment of the court below should be affirmed. Judgment on main bill of exceptions affirmed. Cross bill of exceptions dismissed. All the justices concurring.

TOWN OF COLORADO CITY *v.* LIAFE.

(*Supreme Court of Colorado, June 17, 1901.*)

[65 Pac. Rep. 630.]

Personal Injuries—Gravel Pit—Implied Authority of Street Commissioner.—A street commissioner had authority to superintend the work of all teams in the employ of the city, and, under the direction of the town board, had general supervision of all streets. Plaintiff was injured while securing gravel from a pit under the commissioner's direction. *Held*, that the commissioner had implied authority to secure the gravel to repair the streets, without an express direction from the town trustees.

Same—Sufficiency of Complaint—Waiver of Objections by Answering Over.—Where plaintiff was injured while working under the direction of the street commissioner, defendant, by answering over, waived any objection to the complaint in not alleging which city officer committed the negligence resulting in plaintiff's injury.

Same—Notice of Dangerous Condition of Pit—Evidence.—Where plaintiff was injured by the caving of a gravel pit, a conversation between the street commissioner under whom plaintiff was working

and another employee, which occurred a few minutes before the accident, and in the absence of plaintiff, as to the existence of a crack in the wall of the gravel pit, was admissible to show that the commissioner had notice of the dangerous condition of the pit.

Same—Same—Negligence of City Officials.*—The failure of the commissioner to inform plaintiff of the existence of the crack in the wall of the pit constituted negligence.

Objections to Charge of Court—Failure to Point Out Specific Errors.—Where the court gave a general charge and the defendant made a general objection to it, without pointing out any specific errors, defendant's exceptions to the charge will not be considered.

Excessive Verdict†—Voluntary Remittitur.—Where the court informed plaintiff, who had recovered a judgment for $20,000, that a new trial would be granted unless $15,000 was remitted, and plaintiff elected to remit, the remittance was voluntary, and plaintiff cannot complain of the court's refusal to enter judgment on the verdict.

Verdict on Conflicting Evidence Will Not Be Disturbed.—Where the jury in an action for injuries found for the plaintiff on conflicting evidence, the verdict will not be disturbed on appeal.

Release of Claim for Damages Extorted While Plaintiff Was under Influence of Narcotics—Refunding of Money Paid under Such Release Not a Condition Precedent to Right to Sue.—Where plaintiff, when he signed a release of any claim for damages against defendant for his injuries, in consideration that defendant should furnish him care and medical services, was so much under the influence of narcotics as not to understand the nature of the release, he was not obliged to refund the amount paid by defendant to third parties for plaintiff's care and medical services, as a condition precedent to the right to sue for his injuries.

Same—Instructions Crediting City with Money Paid under Such Release Not Improper.—Where the plaintiff, when he signed a release of any claim against defendant for his injuries in consideration that defendant should furnish him care and medical services, was so much under the influence of narcotics that he did not understand the nature of the release, it was proper to charge that, if the jury should find for plaintiff, they should credit defendant, in rendering their verdict, with the amounts paid by it for plaintiff's care and medical services.

Appeal from district court, El Paso county.

Action by William F. Liafe against the town of Colorado City. From judgment in favor of plaintiff, defendant appeals. Affirmed.

William F. Liafe was employed by the street commissioner of Colorado City to work in a gravel pit as an ordinary laborer, and while so employed the gravel bank caved in and fell upon him, injuring him to such an extent that he was compelled to have his left leg amputated just below the knee. In the complaint the plaintiff charges that his injury was due to the negligence of the officers of the town; that the officers knew that

*See City Council of Augusta *v.* Owens, 4 Mun. Corp. Cas. 194; Rhobidas *v.* City of Concord, 5 Mun. Corp. Cas. 91; Lynch *v.* City of Springfield, 3 Mun. Corp. Cas. 219; Afflick *v.* Bates, Treasurer, 3 Mun. Corp. Cas. 222; Missano *v.* Mayor, etc., of New York, 2 Mun. Corp. Cas. 654; *notes*, 1 Mun. Corp. Cas. 33, 41, 489; 5 Mun. Corp. Cas. 29, 337.

†See Perrette *v.* City of Kansas City, 5 Mun. Corp. Cas. 642; City of Covington *v.* Diehl, 4 Mun. Corp. Cas. 732; City of Goshen *v.* Alford, 4 Mun. Corp. Cas. 405; Badgley *v.* City of St. Louis, 2 Mun. Corp. Cas. 36; City of Roanoke *v.* Shull, 2 Mun. Corp. Cas. 667; Frohs *v.* City of Dubuque, 2 Mun. Corp. Cas. 679; Twist *v.* City of Rochester, 1 Mun. Corp. Cas. 20; Seamons *et ux. v.* Fitts, Town Treasurer, 1 Mun. Corp. Cas. 465.

the gravel bank was in a dangerous condition, and knew that the plaintiff was not aware of its dangerous condition: and that said officers negligently failed to notify plaintiff of the dangerous condition of the bank, but ordered him to go to work at the place where the injury occurred. The defendant denies generally the allegations of the complaint, and, for a second defense, alleges, in substance, that the injuries to the said plaintiff were not due or owing to or caused by negligence on the part of the defendant, but were due to and caused by negligence on the part of the plaintiff, and that "without such negligence on the part of the plaintiff the said injuries would not have happened"; and, for a further defense, that on the 9th of December, 1897, the plaintiff, in consideration of the payment by the town of Colorado City of certain charges for surgical and medical treatment, and for his care at a hospital, executed a formal, written release of the town and of its officers from all damages on account of the injuries received by him on the 8th of December, 1897,—being the injuries complained of in this suit. The replication puts in issue the second defense of the answer, and alleges further that the said agreement was signed by Liafe while he was under the influence of drugs, opiates, and medicines administered to him for the purpose of allaying pain, and while he was incapacitated from attending to business and was ignorant of the contents of said agreement. Upon the trial, W. H. Watson was permitted, over the objection of the defendant, to testify to a conversation alleged to have occurred between the street commissioner and a man named Wilcox, in the absence of Liafe, in reference to the existence of a crack in the gravel bank above the place where Liafe afterwards worked. The testimony, in substance, was as follows: "I know Wilcox by sight. I saw him there at the bank that morning. He went down street, and then came back. Q. What did he say when he came back to the bank? A. He told them to hand him up a shovel, and he would knock the bank down. Q. State all that he said. A. He said that if they would hand him a shovel he would knock the bank down, and he said there was a crack about an inch wide on top. Q. What did Mr. Kinsman say? A. Mr. Kinsman said for him to come down and drive his team in and load it up, so as to get the wagon out, and then knock it down." The witness Watson did not see a crack in the bank, and there is no testimony showing the existence of the crack in the bank; and the witness Kinsman, who was the street commissioner, denied having had any such conversation with Watson. A witness (Harry High) testified that he was a city teamster, and was in the employment of the town, and was working at the gravel pit, at the time of the accident. The plaintiff testified that he was employed on the morning of the 8th of December, 1897, the day of the accident, by Kinsman, the street commissioner, to work in and about the gravel pit in question; that

when he went to the place he was directed by the street commissioner to commence the shoveling of gravel; that within a very few minutes after he commenced to work there was a cave-in, and a large quantity of dirt fell upon him; and that, as the result of the accident, he was compelled to have his left leg amputated just below the knee. The trial resulted in a verdict for the plaintiff in the sum of $20,000. Upon motion for new trial, the plaintiff, upon the statement by the judge of the court that, unless the sum of $15,000 was remitted, a new trial would be granted, remitted the sum of $15,000. The motion for new trial was overruled, judgment was rendered in favor of the plaintiff for the sum of $5,000, and the defendant appeals to this court. Cross errors are assigned by the plaintiff upon the action of the court in requiring that the sum of $15,000 be remitted.

John W. Sleeper and John R. Watt, for appellant.
J. K. Vanatta and Murat Masterson, for appellee.

STEELE, J. (after stating the facts). There are 12 assignments of error; the assignments principally discussed being those relating to the admission of the conversation as testified to by the witness Watson, and the giving and refusal of certain instructions. Misconduct of the attorney for the plaintiff in his address to the jury is alleged as a ground for reversal, and an affidavit concerning the alleged misconduct appears in the record; but the record does not show that the court's attention was directed to the alleged misconduct, and we will not consider the assignment. It sufficiently appears from the record in the case that the street commissioner, who, under the ordinance of the town of Colorado City, has control of the city teams, was engaged in hauling gravel from the pit in question for the improvement and repair of the town property. The defendant was employed by the street commissioner as such, and at the time of the accident was working for the town; and the town is liable to the plaintiff for damages which he may have sustained by reason of the negligent act of the officer of the town while engaged in performing the duties of his office.

The defendant contends that it was not within the power of the street commissioner, without express direction from the board of trustees of the town, to excavate in this gravel pit, even for the purpose of obtaining gravel to repair the streets; but we cannot agree with counsel, and we are satisfied that it was not essential that there should be express authority from the town board to work the gravel pit in question, because the right and authority to obtain the dirt and gravel necessary for the repair of the streets are implied from the power given to the street commissioner "to superintend and direct the working of all teams in the employ of the town," as well as, "under the direction of the town board, to take the general care and supervision of all streets, * * * highways and ditches

within the corporate limits of the town, and to direct and make such repairs and improvements as he may deem necessary and as the board may from time to time direct."

The defendant assigns as error the admission of the record of the appointment of the street commissioner, and under this assignment attacks the sufficiency of the complaint, and says that the allegation in the complaint "that the officers of said town were careless and negligent of their duty towards the plaintiff, and carelessly and negligently failed to notify plaintiff of said dangerous condition, but, on the contrary, ordered him to go to work at a place where he was so injured as aforesaid," does not state a cause of action, and, by way of argument, says that the complaint should have stated which particular officer of the town was so negligent, and that an allegation that the plaintiff was employed by the proper officers of the town is not an allegation that he was employed by the town. The complaint, perhaps, should have been more specific. It should, perhaps, have stated that the plaintiff was employed by the street commissioner of the town, and that he was employed to work for the town; but we are satisfied that the defendant, by answering over, has waived the right to question the sufficiency of the complaint, and has supplied by its answer the defects in the complaint.

The conversation between Wilcox and Kinsman, the street commissioner, was properly admitted. Wilcox's statement to the street commissioner was notice to him that the bank was in a dangerous condition; and, upon being notified, it was the street commissioner's duty to Liafe (who did not hear the conversation, and did not know of the condition of the bank) to inform him of the facts as stated by Wilcox. It was also his duty to make an inspection of the bank, and, if it had cracked and was dangerous, to protect the workmen. The testimony shows that, within a few moments after the conversation with Wilcox, Liafe came to the bank, and was directed by Kinsman to commence work. The testimony is conflicting as to whether Kinsman directed Liafe to work in a particular place, or Liafe selected the place himself. In either event, Kinsman's duty to Liafe was to put him in possession of all the facts within his knowledge which affected the safety of the place Liafe was working in. Kinsman did not notify Liafe that Wilcox had told him there was a crack in the bank on the surface, nor did he make an inspection of the bank. Kinsman testified that there was a constant sliding of the gravel down the face of the bank when the workmen dug under it, but that when the dirt fell which injured Liafe there was an unusually large amount of dirt and gravel came down, so that the jury was warranted in finding that the bank was in a dangerous condition when Liafe commenced work, and that Kinsman had knowledge of it.

We have not been advised by counsel, in argument, of the

error committed by the court in refusing to give the instructions offered, and we must decline, therefore, to consider these assignments. The charge given by the court was a general one, and at the close of the charge the defendant made a general objection to the charge, and took an exception, but did not point out to the court any specific error in the instructions. This court has repeatedly held that, under such circumstances, exceptions will not be considered.

The cross errors, we think, are not tenable. The plaintiff voluntarily remitted $15,000. It was not the less voluntary because the court declined to allow the verdict of $20,000 to stand, and intimated that unless there was a remitment he would grant a new trial, because the plaintiff had the alternative of submitting to a new trial or accepting a verdict for the sum of $5,000; and, having accepted a verdict for the sum of $5,000, we think he cannot now complain that the court refused to enter judgment upon the verdict as rendered.

The material facts necessary for recovery were, under the instructions of the court, found in favor of the plaintiff,—that the plaintiff was employed by the town of Colorado City to work in the gravel pit; that the town had knowledge, through its street commissioner, that the place where the plaintiff was directed to work was a dangerous place; that the plaintiff did not have knowledge that the place was dangerous, and that he went to work without such knowledge, under the direction of the street commissioner; that while so employed he was injured; that the injury was caused by the negligence of the officers of the town. And, there being a conflict in the testimony, we cannot disturb the verdict.

The court properly instructed the jury in reference to the release; and the jury found that the defendant did not, at the time of the signing of the release, comprehend what he was doing, and that, because of the effect of the accident, as well as of the drugs which had been administered to him, his mind was not in such condition as to properly understand that he was making a settlement with the town for and on account of damages.

Counsel claim that, before Liafe was entitled to commence a suit for damages against the town, he should have paid back to the town the money expended by the town for his care and medical services. Without passing upon the question whether or not in cases of this character it is necessary, as a condition precedent to the commencement of the suit, that money paid for and on account of the release should be refunded, in this case no money was received by Liafe, and he only accepted the services of a physician and treatment at a hospital at the instance of the town; and we do not believe that it was necessary, under such circumstances, for Liafe to have ascertained the amount, if any, paid by the town to third persons in his behalf, and to have refunded it to the town before the commencement of the suit. The jury were instructed

by the court, in rendering their verdict, to give the town credit for any sum shown to have been paid by the town for the benefit of Liafe under the terms of the release. We think this instruction was proper, under the circumstances of this case. We perceive no error in the record which would warrant us in disturbing the verdict of the jury, and the judgment is therefore affirmed. Affirmed.

BOARD OF LIQUIDATION OF CITY OF NEW ORLEANS *v.* UNITED STATES *ex rel.* WARNER *et al.*

(*Circuit Court of Appeals, Fifth Circuit, March 5, 1901.*)

[108 Fed. Rep. 689.]

Federal Courts—Ancillary Jurisdiction*—Mandamus to Municipal Officers.†—A federal court has jurisdiction, as ancillary to an action therein in which a judgment was rendered against the city of New Orleans, to award a writ of mandamus against the board of liquidation of the city debt to compel such board to pay or fund the judgment as required by the state statutes. Such jurisdiction is not affected by the fact that the board was not a party to the principal suit, since it is a department of the municipal government created by statute, and charged with the sole duty of liquidating the indebtedness of the city.

Same—Authority to Award Writ of Mandamus Not Dependent on State Law or Practice.—The jurisdiction of a federal court to award a writ of mandamus is not dependent on the laws or practice of the state, but is derived from the federal statute originally section 14 of the judiciary act of 1789, and now Rev. St. § 716.

Municipal Corporations—New Orleans—Indebtedness Fundable under Statute.—Warrants issued by the city of New Orleans under a contract made in 1876 constitute floating debt claims, within the terms of legislative act No. 67 of 1884, which provides that the board of liquidation of the city debt "is hereby authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered, * * * and that which hereafter may become merged into judgments and likewise registered, except the floating debt or claims created for and against the year 1879 and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to * * *, and to such floating debt or claims against said city for 1878 and previous years, merged and to be merged into executory judgments." Such provisions are, moreover, mandatory, and vest the board with no discretion to refuse to pay or fund, as provided in the act, any judgment rendered on a claim embraced within its terms.

Same—Judgments.—The New Orleans funding act, passed as part of

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*Supplementary and ancillary proceedings and relief, see *note* to Toledo, St. L. & K. C. R. Co. *v.* Continental Trust Co., 36 C. C. A. Rep. 195; 3 L. R. A. 190, *note*.

†Howard *v.* City of Huron (S. Dak.), 26 L. R. A. 493, and brief; Ray, Treasurer, *v.* Wilson (Fla.), 14 L. R. A. 773, and *note*; Mayor, etc., of Guthrie *v.* Territory of Oklahoma *ex rel.* Marquis D. Losey, 1 Okla. 188, 21 L. R. A. 841; Sherlock *v.* Stuart, 96 Mich. 193, 21 L. R. A. 580; Safford *v.* Board of Health of the City of Detroit (Mich.), 33 L. R. A. 300; Swindell, Mayor, *v.* State of Indiana, 143 Ind. 153, 35 L. R. A. 50; State *ex rel.* Badger *v.* City of New Orleans, 49 La. Ann. 804, 37 L. R. A. 540; Wells *v.* Com'rs. of Hyattsville (Md.), 20 L. R. A. 89; Mayor, etc., of Baltimore *et al. v.* Keely Institute (Md.), 27 L. R. A. 646; Thomas *v.* Town of Mason (W. Va.), 26 L. R. A. 727.

B'd of Liq. of City of New Orleans *v.* U. S

Act No. 110 of 1890, and ratified by the constitutional amendment adopted in 1892, appropriates the proceeds of the sale of $10,000,000 of constitutional bonds to the payments of judgments and the outstanding bonds of the city "matured or subject to be called." *Held*, that the board of liquidation, charged with the duty of administering the fund, could not defend against an application for a writ of mandamus to require it to pay or fund a judgment fundable under such law on the ground that the bonds remaining in its hands were required to retire outstanding unmatured bonds not shown to be subject to call, such bonds not being within the terms of the act, and, even if they were, having no right of precedence over judgments.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

The following is the opinion of the circuit court (SWAYNE, District Judge):

It appears from the undisputed facts in this case that the relators lately recovered judgments against the city of New Orleans for considerable amounts, based on drainage warrants issued by the city in discharge of the consideration of a contract of purchase and compromise entered into between it and Warner Van Norden, transferee of the Mississippi & Mexican Gulf Ship-Canal Company, on the 7th day of June, 1876; that writs of fi. fa. were issued on the judgments, which were returned nulla bona, prior to the filing of the petition herein; and that the judgments have been registered in the office of the comptroller of the city, under the provisions of legislative Act No. 5 of 1870. The relators have brought this proceeding praying for the issuance of a writ of mandamus for the purpose of compelling the board of liquidation of the city debt to fund their judgments. Their claim to relief is based on the provisions of various articles of the constitution and acts of the legislature of the state. By article 254 of the constitution of 1879, the general assembly was directed at its next session after the adoption of the constitution to enact such legislation as might be proper to liquidate the indebtedness of the city of New Orleans, and apply its assets to the satisfaction thereof. In obedience to this mandate, the legislature at its next session passed Act No. 74 of 1880, which authorized the city to issue 3 per cent. bonds in exchange for the unbonded valid indebtedness of the city not in judgment. At the same session, Act No. 133 was passed, which created a board of liquidation, composed of six citizens, giving them exclusive control of all matters relating to the bonded debt of the city. The third section of the act authorized and empowered the board to retire and cancel the entire valid debt of the city of New Orleans, except the floating debt created prior to the date of the act, and for this purpose required the city to issue $10,000,000 of its bonds, to be used by the board to take up such indebtedness. This section of the act was subsequently amended by Act No. 67 of 1884, in the following language: "Be it enacted that section 3 of Act 133, approved April 10, 1880, be amended and re-enacted so as to read: That the

said board of liquidation of the city debt be, and it is hereby authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments, and registered, under the provisions of Act No. 5 of 1870, and that which hereafter may become merged into judgments and likewise registered, except the floating debt or claims created for and against the year 1879 and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments at present rendered against said city and to such floating debt or claims against said city for 1878 and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years previous to the year 1879; that for the purpose of retiring and cancelling said judgment debt the said board is authorized and required to sell the bonds to be issued under this act at not less than par value and apply the proceeds thereof to the payment of the said judgment as above specified, or issue said bonds in exchange for said judgments." These enactments seem to have remained in abeyance until 1890, when, by joint resolution No. 110 of that year, another funding act was passed, substantially of the same character as that of 1884, and submitted to the people for ratification by a constitutional amendment, which was adopted in 1892. The third section of this act, so ratified, provides that the $10,000,000 of bonds therein required to be issued shall be sold by the board of liquidation, and the proceeds deposited to the credit of a fund to be called "Bond Sale Fund," "which said fund shall be used solely and exclusively for the purpose of retiring by payment all said now outstanding valid bonds of the city of New Orleans, matured or subject to be called, including the certificates or bonds issued under the fourth section of the Act No. 58 of 1882, and including judgments now or hereafter rendered on floating debt claims prior to 1879, entitled to be funded under Act No. 67 of 1884." The board of liquidation admits that of the $10,000,000 of bonds issued under these funding laws there remain in its hands, unsold, bonds to the amount of $991,500, applicable to the payment and retirement of the bonded and judgment indebtedness of the city, but denies that the relators are entitled to the relief prayed for in their petition. The defenses set up in the answer may be stated under the following heads: First. That this is an original proceeding for a mandamus, not ancillary to the suit in which the judgments of relators were recovered, of which the court has no jurisdiction. Second. That the judgments of the relators are not based on floating debts or claims against the city, entitled to be paid under any of the said funding laws. Third. That the funding of said judgments is discretionary with the board of liquidation, and that it cannot be coerced by the courts. Fourth. That the board is in duty bound to retain enough of

said bonds to meet all outstanding unmatured bonds of the city,—this on the theory that the bonded debt is entitled to priority over the judgments.

None of these defenses are, in my opinion, well pleaded. The objection to the jurisdiction is based upon the theory that the present proceeding, although it seeks to enforce a remedy provided by statute for the payment of judgments against the city, is an original suit, not ancillary to the relators' judgments because it is brought against the board of liquidation, which, it is claimed, is a third person, entirely distinct from the city. The city and board of liquidation are, no doubt, for certain purposes, separate corporations, but it does not follow that the board is not a part of the municipal government of the city of New Orleans. Its only function under the law creating it is that of a statutory trustee to fund the debt of the city, and to receive and disburse the revenues applicable thereto. But, in my opinion, it is not necessary to define the true relation existing between the board and the city. It is enough, for the purposes of this case, that the relators are entitled to obtain satisfaction of their judgments in the manner provided by these funding laws. The right to a mandamus against one corporation charged by statute with the payment of a judgment against another has the direct sanction of the supreme court of the United States in the case of Labette County Com'rs v. U. S., 112 U. S. 221, 5 Sup. Ct. 109, 28 L. Ed. 699. Says Justice Matthews in this case: "The objection that the circuit court had no jurisdiction to issue its mandamus to the plaintiffs in error is based upon the supposition that, because they are not parties to the judgment against Oswego township, and are not officers or representatives of that municipal corporation, but are officers of the county of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court. It is quite true, as it is familiar that there is no original jurisdiction in the circuit court in the mandamus. * * * But it does not follow, because the jurisdiction in mandamus is ancillary merely, that it cannot be exercised over persons not parties to the judgment sought to be enforced. An illustration to the contrary is found in that class of cases of which Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, is an example."

There seems to be no foundation for the further contention made by the board that the circuit court of this district has no jurisdiction to issue the writ of mandamus in any case, because it has not been shown that the remedy was adopted from the state practice by the practice act of 1872, or any general order of this court. The writ was authorized by the fourteenth section of the original judiciary act of 1789, now section 716 of the Revised Statutes, and is not derived from any practice act of the state. Bath Co. v. Amy, 13 Wall. 244, 20 L. Ed. 539; Riggs v. Johnson Co., 6 Wall. 167, 18 L.

Ed. 768; Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743.

The contention that the drainage warrants upon which the judgments of the relators are based, which were issued under the contract made by Warner Van Norden with the city of New Orleans in 1876, do not constitute a claim against the city, or form part of the floating debt of the city entitled to be funded under Act No. 67 of 1884, is equally untenable. The debts upon which these judgments were rendered necessarily originated under the contract of 1876, and the judgments themselves fix the date when the debts or claims represented by the warrants became due by allowing interest from June 6, 1876. That the warrants became claims when issued, admits of no doubt. Payment not being provided for by the city, they were floating debt claims, and, as such, are included within the class of indebtedness fundable under the law. Duchenne v. Board, 51 La. Ann. 1142, 26 South. 55; People v. Wood, 71 N. Y. 374.

The argument that the indebtedness represented by the warrants is not a claim, or a floating debt claim against the city, intended to be funded by the lawmaker, because it had never been recognized and carried on the books of the city as a liability, is supported by neither reason nor authority. It is enough that these funding laws are so written as to include that indebtedness in express terms.

But it is contended, admitting all this to be true, that it is entirely discretionary with the board whether it will fund relators' judgments or not. I have carefully examined the various statutes defining the powers of the board, and find no provision of the law tending to support this proposition. Act No. 67 of 1884 is not, in any sense, a directory or permissive statute, but it is in the highest degree mandatory. The language of the act is, "That the board of liquidation of the city debt be, and is hereby, authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans," etc. But, even if the language of the statute granting authority to the board had been permissive in form, it would be treated, on principle, as mandatory in fact. Says the supreme court in Supervisors of Rock Island Co. v. U. S., 4 Wall. 446, 18 L. Ed. 423: "The conclusion to be drawn from the authorities is that, where power is given to a public officer, whenever the public interest or individual rights call for its exercise, the language, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice." The board of liquidation, being without discretion to refuse to fund the relators' judgments, its action is clearly subject to judicial review. Creole Steam Fire-Engine Co. v. City of New Orleans, 39

La. Ann. 981, 3 South. 177. Whether a judgment is fundable is necessarily an issue in all proceedings for mandamus in cases of this character, to be determined by the court in the same manner as to other issues. Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574.

The only other question requiring consideration is whether the board of liquidation has the right to retain a sufficient amount of these bonds to satisfy the prior writs of mandamus granted in the suits of Mrs. Fisher et al. and Mrs. Wilder et al., and also a sufficient amount to meet certain outstanding unmatured bonds of the city, which it is claimed are fundable. I understand that the relators' attorneys concede that enough bonds should be reserved to satisfy these prior writs, but deny the authority of the board to retain any bonds to refund bonds that are not yet due. The contention of the relators as to the unmatured bonds is correct. The funding act passed as part of Act No. 110 of 1890, which was ratified by the constitutional amendment adopted in 1892, appropriates in express terms the proceeds of the sale of the $10,000,000 of constitutional bonds to the payment of judgments and the outstanding bonds of the city, "matured or subject to be called." As it appears that all the outstanding bonds are unmatured, and it does not appear that any are subject to be called, or have been called, they are necessarily excluded from the benefit of the funding laws. Even if this were not so, I find nothing in these laws giving bonds a priority over judgments in the application of the proceeds of the sale of constitutional bonds, and the court can give none. When a creditor has accepted the offer to fund, and has made a demand for payment, it is not for the board of liquidation to refuse because some other creditor may present himself at some future day, and make a like demand. The maxim is, "Qui prior est tempore potior est jure."

B. K. Miller, for plaintiff in error.

John D. Rouse, Wm. Grant, and Richard De Gray, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. All the reasons urged for reversing the judgment below in this case are fully met and answered in the opinion filed by the acting circuit judge, and found in the record. The judgment of the circuit court is therefore affirmed.

TOWN OF SPRINGFIELD *v.* PEOPLE'S DEPOSIT BANK.

(Court of Appeals of Kentucky, May 31, 1901.)

[63 S. W. Rep. 271.]

Validity of Tax Levy—Irregular Meeting of Board of Trustees.—A levy made by the board of trustees of a town of the sixth class, at a

Town of Springfield *v.* People's Deposit Bank

special session called by the clerk of the board at the place of business of one of its members, which was not the usual meeting place, was void.

Same—Assessment Made by Unauthorized Person—Failure to Appoint Board of Equalization.—An assessment made by one of the trustees of a town by permission of his associates, when he had not been elected and had not qualified as assessor, was void, especially as no board of equalization was appointed to pass upon complaints of taxpayers.

Appeal from circuit court, Washington county.

"To be officially reported."

Action by the town of Springfield against the People's Deposit Bank to recover taxes. Judgment for defendant, and plaintiff appeals. Affirmed.

I. H. Thurman and J. W. S. Clements, for appellant.

W. C. McChord, for appellee.

O'REAR, J. Appellant, town of Springfield, Ky., is a town of the sixth class, and brings this suit against appellee to recover taxes alleged to have been assessed against its property, in common with other property in that town, for the year 1894. It appears that those acting as members of the board of trustees had failed to provide a regular place of meeting of the board, and had been in the habit of meeting at the law office of Mr. Thurman, their legal adviser. On the 15th day of February they met in special session at the saloon of one Green, who was a member of the board of trustees, having been called into that extra session by the clerk of the board. The chairman of the board was not present; whereupon R. B. Curry, one of its members, was chosen president pro tem. The board, as then constituted, passed the following order: "February 15, 1894. At a meeting of the board of trustees held at the saloon of John F. Green, in said town, there were present R. B. Curry, John F. Green, and Robert Noe. A. C. Cunningham, the chairman, not being present, R. B. Curry was elected chairman pro tem. Ordered that the levy for town taxes for the year 1894 be 40 cents on each $100.00 of property in said town, and one dollar poll tax for town purposes. The meeting then adjourned." One of the trustees, by permission of his associates, undertook to and did assess the property of the town for the fiscal year, but without being elected or qualified as assessor. Nor was a board of equalization appointed after the assessments to pass upon complaints of taxpayers. Other objections were urged to the levy and attempted collection by appellant, but the foregoing we deem sufficient to notice.

The circuit court adjudged the levy and assessments insufficient, and we think correctly so. The place and manner of the meeting at which the levy ordinance was adopted was not in conformity to law, nor was the assessment. On this last point, Judge Cooley, in his work on Taxation, says (pages 352–354): "Necessity for Assessment. An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceed-

ings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is therefore the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. The assessment being so important, the statutory provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if its officers, instead of observing them, may substitute a discretion of their own, the most important security which has been devised for the protection of the citizens in tax cases might be rendered valueless. The assessment must, therefore, be made by the proper officers, or it will be void; and if a board of review, which has the power to appoint the assessors, and afterwards to review their work, should appoint any of their own members to that office, the appointment would be void, and the assessment made by the appointees illegal. So the assessment will be void if the assessors delegate the office of making it to a clerk." The important and sovereign power of levying taxes against the citizens' property, while an essential act of government, must be attended with that circumspection of care and manner that will insure publicity, certainty, and legality of the act done. Such loose methods as shown in this case, if tolerated, would practically leave the property of the citizens subject to seizure and appropriation at the will and upon the act of a mere caucus of a town council; that is, at a casual meeting of a majority of its members, at any place within the town, and at which their constituents would have no opportuity to be present, and by that potent influence, or legitimate representation, have their views and interests directly considered. It was to prevent such evils that the present statutes on this subject were enacted. The judgment of the circuit court is affirmed.

CITY OF CHICAGO *v.* SPOOR *et al.*

(Supreme Court of Illinois, April 18, 1901.)

[60 N. E. Rep. 540.]

Viaduct over Street Railway—Diversion of Traffic—Damages Not Recoverable for.—Where a viaduct, beginning in front of plaintiff's property, was erected over railway tracks so that street cars could cross without stopping, plaintiff could not recover damages caused by the diversion of traffic, not because fewer people passed over the street, but because fewer people came onto the street from surrounding places of business and stopped there, since plaintiff could not recover for such damages.

Same—Same—Evidence.—Where, in an action against a city for damages to abutting property, caused by a public improvement, the admission of evidence of damages which included damages caused by

diversion of traffic from a street could not be cured by instructions, since such evidence was not legitimate for any purpose.

Same—Same—Elements of Damage—Instructions.—Where, in an action against a city for damages to abutting property, caused by the construction of a viaduct on the street, the defendant requested an instruction that plaintiff could not recover for any injury caused by a diversion of traffic from such street in front of the premises by the construction of a viaduct, it was error to modify such instruction by adding to it that obstruction to the ingress and egress to and from the premises would be an element of damages; that diversion of traffic was an element of damages too remote and speculative to be the basis of recovery, where a party sought them for loss of profits to his business, but, if the question was not loss of profits, but damages to abutting property, every element directly affecting the market value of the property by reason of the improvement should be considered,—since defendant was entitled to a clear statement of the rule of law as asked, and it might be inferred from such modification that it was proper to consider diversion of traffic in a suit for damages to abutting property.

Same—Same—Same—Evidence—Waiver of Objections.—Where, in an action against a city for damages to abutting property, caused by the construction of a viaduct on the street in front of it, plaintiff's witnesses, in testifying as to damages, did not specify any of the elements thereof, defendant did not waive objections to such evidence that it included damages for diversion of traffic by bringing such elements out on cross-examination, where the cross-examination was for the purpose of showing the basis of witnesses' estimate to be unsound and illegal, for the purpose of having the testimony stricken, since defendant did not thereby adopt a theory of law against which it was protesting.

Same—Same—Same—Same.—Defendant did not waive such objection by introducing evidence that the viaduct increased facilities for travel, bringing the property nearer to the business center, thereby benefiting it. Evidence having been admitted to show that the property was injured by the improvement, it was defendant's right to contradict it.

Same—Same—Evidence of Benefit to Other Property of Plaintiff.—In an action against a city for damages to abutting property, caused by the construction of a viaduct on the street in front of it, other property of plaintiff's facing on another street, being separated by an alley from the property claimed to be injured, it was proper to refuse evidence of benefits to such property, caused by the improvement.

Same—Same—Court Commenting upon Photograph Offered in Evidence.—It was error for the court, in admitting a photograph offered to show the location of buildings on an approach to a viaduct, and the appearance of such buildings, to say that it was for the jury to say how much stock they take in testimony of that kind, since it was an intimation that the jury ought not to give any weight to the evidence.

Same—Same—Defense by City—Improvement Irregularly Authorized.—In an action against a city for damages to abutting property, caused by the construction of a viaduct on a street in front of it, it is no defense that the viaduct was constructed under an order of the city council, when it should have been done in pursuance of an ordinance, since the improvement was within the authority of the defendant, and any irregular or defective exercise of the power would be no protection to the city.

MAGRUDER, J., dissenting.

Appeal from appellate court, First district.

Suit by John A. Spoor and others against the city of Chicago to recover damages caused by a public improvement. From a judgment of the appellate court (91 Ill. App. 472) affirming a judgment in favor of plaintiffs, defendant appeals. Reversed.

Charles M. Walker, Corp. Counsel, and Thomas J. Sutherland, for appellant.

Winston & Meagher (Silas H. Strawn and Ralph M. Shaw, of counsel), for appellees.

CARTWRIGHT, J. Block 12 of the superior court partition of the W. ½ of the N. W. ¼ of section 4, township 38, range 14, in Cook county, is in the city of Chicago, and is bounded on the north by Forty-First street, on the east by Emerald avenue, on the south by Root street, and on the west by Halsted street. The block contains 34 lots, and in 1896 appellees were the owners of the entire block except 5 lots. The conveyance to them was of the whole block except lots 18, 19, and 30, and they afterwards sold lots 20 and 21. The west side of Halsted street was the private property of the Union Stock Yards & Transit Company, and Root street, Forty-First street, and Fortieth street (which was the next one north) extended east from Halsted street, but did not cross that street. Fortieth street, one block north of this property, was occupied with 17 railroad tracks of the Union Stock Yards & Transit Company. These tracks spread out in Fortieth street near the entrance to Halsted street and the stock yards, and occupied 350 feet of Halsted street. Formerly, horse cars ran on Halsted street to Fortieth street, and stopped. The passengers had to get off, cross the railroad tracks on foot, and transfer to a car on the opposite side. In October, 1895, the city council ordered the street-railway company to run its cars over the railroad tracks without causing passengers to transfer. By conference between the Union Stock Yards & Transit Company, the City Railway Company, and the appellant it was agreed that a viaduct should be built over the tracks, and the City Railway Company and the Union Stock Yards & Transit Company agreed to defray the expenses of the viaduct. The object of the viaduct was to carry the street traffic over the tracks on account of the dangers and delays at the crossing. On January 6, 1896, the city council passed an order providing for the construction of the viaduct, beginning in front of said block 12, and running north. The stock yards extended from a little north of Thirty-Ninth street as far south as Forty-Seventh street, on the west side of Halsted. The viaduct was begun about the middle of February, 1896, and completed in September of that year. The approach on Halsted street began in front of lot 25, and rose about 1 foot in 30 from that point north to lot 34, at the northwest corner of the block. At the northwest corner of lot 34 the approach was about 9 feet above the natural surface, and there was an approach on Forty-First street adjoining the block connecting with the approach on Halsted street. On lot 25 there was a two-story frame building, which did not belong to appellees, and the other lots were vacant. After the completion of the viaduct, appellees began this suit in the circuit court of Cook county to recover damages alleged in their declaration to have been sustained to lots 25 to 34, inclusive, except lot 30, by destroy-

ing the free and convenient access to and from the premises from the street, and cutting off light and air. Additional counts were filed in 1897 and 1899, charging interference with access to and from the lots. Appellant pleaded the general issue, and there was a trial. The jury returned a verdict of guilty, and assessed appellees' damages at $10,750, and judgment was entered on the verdict. An appeal was taken to the appellate court for the First district, where the judgment was affirmed, and this appeal was then taken from the judgment of the appellate court.

On the trial five witnesses were called by plaintiffs, and each one testified to the fair cash market value of the property before the passage of the order for the viaduct and such value after the completion of the viaduct, and each one said that he attributed the change in valuation to the construction of the viaduct. The different witnesses placed the market value before the viaduct was built at sums ranging from $150 to $200 a front foot and from $75 to $90 afterwards. The lots for which damages were claimed had a total frontage of 225 feet on Halsted street. On the direct examination no inquiry was made of either of these witnesses, and nothing was developed, as to the nature of the alleged injury to the property, the elements of damages included, or the basis for his judgment. These witnesses were cross-examined by defendant for the purpose of ascertaining on what basis they estimated the damage. The most prominent element of damage in the minds of the witnesses was the character of the traffic and travel on Halsted street after the viaduct was built and the fact that fewer people came from the stock yards upon the street, so that less business could be done there. The plaintiff Spoor was one of these witnesses, and on cross-examination he said that before the viaduct was built people came from the stock yards over the tracks at Fortieth street upon Halsted street, and that fact brought business to the shops and stores; that people coming from the stock yards a block north of this property could not come on Halsted street, so that their trade was lost; that after the viaduct was built there was more traffic on the street than before, but that it was not of a character to stop there; that, instead of the old horse cars that came along and stopped on each side of the tracks, there was a trolley system, and the cars ran right through, stopping only at street crossings; that the blocking of the tracks across Halsted street was a benefit to the property, and it was an injury to this property to have through travel; that the advantage to the property resulted not so much from traffic on the street as the ability of the traffic to stop and get at the place, and that the through traffic was a serious damage to the property because people did not walk on the street, but went past on cars. Another witness (John W. Sweeney), testified that the former condition, when people got off and walked across the tracks, and found other cars, or had to wait, was a benefit to

the property; that it took so long to go down town that people patronized their neighbors, and left their money there; that men working in the stock yards came out at Fortieth street, a block north, and came upon Halsted street, and patronized the places there, and that they spent their money and made business there, and business was diverted by turning it in other directions. He attributed the depreciation in value of the property largely to these causes, and said the fact of building the viaduct killed the business there, and taking that away left the property of little value. The witness was asked what the damage was by reason of this diversion of business which formerly came from the stock yards and from the tracks at Fortieth street, but the court sustained an objection to the question. The defendant asked the witnesses to separate the damages resulting from the fact that people did not walk or stop on the street, but went through on trolley cars, and the diversion of traffic that formerly came on Halsted street, from the interference with ingress and egress to and from the lots, and other causes of damage. The witnesses could not divide up the damages, or distinguish between the different causes, and the defendant then moved to strike out the testimony as to depreciation in market value by reason of the construction of the viaduct, because the estimate included elements of damage for which there could be no recovery; but the motion was overruled. It appears from the statements of the court in ruling on the objections that the view of the court was that, while a party could not sue and recover for loss of profit to business on account of a viaduct, yet, if there was an injury to abutting property, there could be a recovery for everything that went to make up the market value of the lots, whether it was a diversion of traffic or whatever it might be. This being a suit where access to the property was affected, the court seems to have held that everything resulting from the improvement which affected unfavorably the utility of the property for business purposes was an element of damage.

The rule that there can be a recovery for any injury to property by cutting off access to a public street whereby the property is permanently damaged and depreciated in value was established in Rigney v. City of Chicago, 102 Ill. 64. The court, however, limited the right of recovery in this language (page 80): "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value; and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." Afterwards, in Railroad Co. v. Scott, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330, where there was a right to the use of a highway in connection with the farm of Scott, he was allowed to recover damages for interference with the use of the highway

by the location of a railway, lessening the value of the farm. In neither of these cases was any damage allowed for a diversion of travel or traffic from the highway or street; but in Hohmann v. Chicago, 140 Ill. 226, 29 N. E. 671, the question involved in this case was considered. In that case Hohmann owned a leasehold estate in premises in which he carried on the saloon business in the first story and occupied the second story as a residence. The declaration charged the city with erecting a viaduct on Northwestern avenue, one of the approaches being in front of the said premises, thereby obstructing the access to said premises, and diminishing the easements of light and air. It was alleged that the leasehold estate was depreciated in value, and the traffic and travel of Northwestern avenue was lessened, diverted, obstructed, and cut off, so as to diminish the receipts of Hohmann's business. Evidence of the same character as in this case, to the effect that a large number of persons employed in railroad yards had formerly patronized plaintiff, and that, after building the viaduct, his business fell off, and the market value of his leasehold was diminished, was offered and rejected. Persons coming on foot from the railroad yards preferred, as in this case, to go some other way, rather than ascend the stairway up to the roadway of the viaduct. This court recognized the rule that plaintiff had a right to have the avenue kept so as not to cut off access to his premises, and that, if it was cut off, it was a matter proper for the jury to consider; but it was held that a diversion of customers was not an element of damage for which Hohmann could recover. The effect of the evidence would have been to show that less people traveled along the avenue than formerly, and the number of customers was diminished; but it was held that Hohmann had no legal interest in the amount of general travel by the public along the avenue, and no legal right to complain that it was lessened. An owner of property has no legal right that traffic shall go past in horse cars or on foot, or that a city shall not increase the facilities for through travel. Any scheme of rapid transportation would have had the same effect on this property detailed by the witnesses, and the only relation the viaduct had to the trolley was that it created facilities for that method of transportation. It was not a right of the plaintiffs, as against the city, to have Halsted street maintained in such a way that people coming from the stock yards would find it convenient to come out upon Halsted street, so as to make more travel and traffic by the property. As they had no legal right of that kind, there was no infringement of any right, and there could be no recovery for resulting damages. It is clear that the amounts estimated by plaintiffs' witnesses consisted, in large part, of damages of that character. With one exception, they made no distinction as to the damage between lot 25, where the approach commences, and access is hardly obstructed at all, and lot 34, where the approach is about nine feet high; and

the lots are all of the same character, being vacant, and not used for any kind of business. As the estimates included damages for injuries to supposed legal rights which had no existence, the court erred in not striking out the testimony when moved to do so.

It is argued on the other side that it was proper to leave the estimates of damage by plaintiffs' witnesses before the jury, although they included damages not recoverable, and then control the evidence by an instruction. It is plain that the injury to the defendant could not be repaired by an instruction. The witnesses themselves were not able to separate the damages, and state what part of their estimate rested on an improper basis. The jury could not separate what the witnesses who made the estimate could not, and no instruction would enable them to do so. Furthermore, the rule is not as claimed. If evidence is competent for one purpose and not for another, its application may be controlled by an explanation to the jury when it is admitted, or, in some cases, by an instruction; but, where it is not proper for any purpose, it is error to submit it to the consideration of the jury. The evidence of damages resulting from diversion of traffic or changing the method of transportation on the street was not legitimate for any purpose, and opinions of witnesses based on depreciation from those causes should have been excluded.

Again, the instructions, in our opinion, did not put before the jury the correct rule. There were some instructions on the subject, and the view of the court is fairly shown by instruction No. 7, which was asked by the defendant, and modified by the court. That instruction, as asked, was as follows: "The jury are instructed that the plaintiffs herein are not entitled to recover because of any alleged injury resulting to the fair cash market value of said premises because of any alleged diversion of traffic off from Halsted street, in front of said premises, by the construction of said viaduct, even if they believe from the evidence that any such diversion of traffic has in fact resulted from such cause." But the court added the following: "But if you believe, from the evidence, including your view of the premises, that the fair cash market value of the premises was decreased by reason of the obstruction to the ingress and egress thereto caused by said public improvement, this would be an element of damage if such obstruction is shown by the evidence, including your view of the premises. Diversion of traffic as a result of a public improvement is an element of damage which is considered in law too remote and speculative to become the basis of recovery in a suit wherein a person seeks damages or loss of profits to his business from the author of such improvement, because it would be impossible to ascertain how many persons were diverted from this accustomed route by reason of the improvement alone, and how many from other causes or from mere

caprice. But, if a public improvement depreciate the value of abutting property, then every element which the jury may find from the evidence and its view of the premises, which directly affects the market value of the property by reason of the public improvement, so as to make it of less value upon the market after such public improvement than it was before, is proper for the jury to consider in a suit where the question is not as to loss of profits to business, but for damages to abutting property." The instruction, as asked, stated that the plaintiff coud not recover because of any alleged injury resulting from a diversion of traffic from Halsted street. The qualifications added by the court were: First, that obstruction to the ingress and egress to and from the premises would be an element of damage, which was foreign to the subject of the instruction; second, diversion of traffic is an element of damage too remote and speculative to be the basis of recovery where a party seeks damages for loss of profits to his business; but, third, if the question is not loss of profits in business, but damages to abutting property, then every element which directly affects the market value of the property by reason of the public improvement is proper for the jury to consider. Defendant was entitled to a clear statement of the rule of law, as asked, that diversion of traffic was not an element of damage, without annexing a statement that something else would be; and we think the instruction as finally modified, in its discursive form, might readily be understood as laying down the rule that it is proper to consider diversion of traffic affecting the market value of the property if the suit is for damages to abutting property, but not if the suit is for loss of profits in business. This is not materially different from the statements of the court in ruling on the questions raised on the evidence. It could not be said that, if a party should sue for damages on account of a diversion of traffic, he could not recover, because he had no legal right which had been infringed, but, if he sued for damages by cutting off access to his property, he could include damages from diversion of traffic, as to which he had no legal right.

It is also urged that the defendant waived its right to complain of the errors by the cross-examination of plaintiffs' witnesses and introducing evidence that increased facilities for travel benefited the property. Counsel say that plaintiffs' witnesses said nothing about the elements of damage on which they based their estimates in the direct examination, but that defendant brought it out by cross-examination. It is true that a party cannot adopt a theory of the law, and then complain that the theory was not the right one; but here the defendant cross-examined the witnesses for the purpose of showing the basis of their estimate to be unsound and illegal, and for the purpose of having the testimony struck out. Defendant did not adopt the theory against which it was protesting. Neither did the defendant waive its right by intro-

ducing evidence that better facilities for travel brought the property nearer to the business center, and did not injure it, as claimed by the plaintiffs. After the court had ruled that the testimony should remain in, it was the right of the defendant to contradict it. The defendant did not bring before the jury the diversion of traffic as a proper element of damage, but only showed that this improper element was included in the estimate of plaintiffs' witnesses.

Complaint is made that the court refused to allow any inquiry as to benefits from the improvement to lots 22, 23, and 24, fronting on Halsted street south of the approach, and to the lots fronting on Emerald avenue. Defendant did not make any inquiry about the effect on the three lots which fronted on Halsted street, and which were connected with the property as to which damages were claimed, but did make such inquiry as to the lots fronting on Emerald avenue, and the court refused to admit the evidence. The lots on Emerald avenue were separated from the other lots by an alley 16 feet wide, and under the ruling in White v. Railroad Co., 154 Ill. 620, 39 N. E. 270, the ruling of the court was right. These lots were not connected with the lots sued for, and plaintiffs could neither recover damages for injury to them nor defendant set up the alleged benefits.

During the examination of one of defendant's witnesses a photograph was offered showing the location of buildings upon an approach to a viaduct, and the appearance of such buildings. The court admitted the photograph, but said, "It is for the jury to say how much stock they take in testimony of that kind." The intimation was that the jury ought not to give any weight to the evidence. It was an interference with the function of the jury, and error. Kennedy v. People, 44 Ill. 283; Andreas v. Ketcham, 77 Ill. 377.

At the close of the evidence the defendant moved the court to direct a verdict for it, which the court refused to do. It is argued that the order under which the viaduct was built was void, and for that reason there was no liability on the part of the defendant. The argument is based on the proposition that the viaduct could only be legally constructed in pursuance of an ordinance, and, as it was constructed under an order of the city council, the city was not liable. The improvement was not beyond the authority of the defendant, and, where there is power to pass an ordinance or undertake an improvement, any irregular or defective exercise of the power is no protection to the city. Elliott, Roads & S. (2d Ed.) § 503. It is immaterial whether the defendant proceeded regularly or irregularly in the exercise of its power.

We have noticed the most material questions raised by counsel, and, being of the opinion that the defendant did not have a fair trial upon the proper basis as to damages, the judgments must be reversed. The judgments of the appellate court and circuit court are reversed, and the cause is remanded to the circuit court. Reversed and remanded.

MAGRUDER, J. (dissenting). I do not concur in this opinion, or in the conclusion reached. I think that the opinion of the appellate court affirming the judgment of the circuit court correctly disposes of the questions involved. That opinion is, in part, as follows:

"It is claimed for appellant that the court, at the close of all the evidence, should have directed a verdict for it, because there was no valid authority shown for the construction of the viaduct in question, and therefore that the city was not liable in damages by reason of its construction. There was offered in evidence a copy of the resolution of the city council, dated January 6, 1896, and passed on that day, which, after reciting the previous orders of the council, and certain matters showing the necessity for the viaduct by reason of the crossing at grade of the railroad tracks of the Union Stock Yards & Transit Company and the introduction of electric cars by the Chicago City Railway Company on Halsted street, by which the mayor and commissioner of public works are directed to cause plans to be forthwith prepared for the viaduct in question, and to let the necessary contracts for the construction of the same, upon obtaining from said two companies, or either of them, an agreement to provide all moneys required to meet such contract. It was stipulated on the hearing between counsel that the construction of the viaduct under said order was commenced about the middle of February, 1896, and was completed about the end of September, 1896. This order of the common council and a stipulation that the viaduct was constructed under the order is sufficient, in our opinion, to fix the liability of the city of Chicago for any damages to appellees' property resulting therefrom; and it is immaterial, as contended for appellant, that it was not shown that any ordinance was passed by the common council for the construction of the viaduct, nor that the viaduct was constructed under a contract executed with the city, nor whether the money to pay for the viaduct came from the city treasury, nor that an appropriation had been made to pay for the cost of the work. The authorities cited by counsel for appellant in this regard are inapplicable. It is sufficient, to fix the liability of the city, that the viaduct in question was constructed by means of or through the action of the common council. City of Chicago v. Turner, 80 Ill. 419, and cases cited; City of Chicago v. Chicago & W. I. R. Co., 105 Ill. 73; Culbertson & Blair Packing & Provision Co. v. City of Chicago, 111 Ill. 651. Indeed, when such a structure as a viaduct is found in the streets of a city, that of itself is presumptive evidence that the city is responsible for its erection. Village of Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33; City of Chicago v. Johnson, 53 Ill. 91. In the Turner Case, supra, it was said (referring to the case of City of Pekin v. Newell, 26 Ill. 320): 'If the city is authorized to construct a highway in a particular manner, but does it in a different one, it will be answerable in

damages to a party sustaining injury upon it as much as though it had not exceeded or deviated from its authority. So there, also, was no question of power, but only as to the lawfulness of its execution'; and held that a municipality is liable for its acts within its general power, though irregularly authorized or done. The same principle is announced in the second case above cited (105 Ill. 73) in the following language: 'We recognize the doctrine to be that the unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular act relates.' In the Culbertson Case, supra, which was an action upon the case for damages in consequence of the construction of a viaduct which was partly paid for by a railway company, and the work done under the joint superintendence of the department of public works and the engineer of the railway company, it was held that the company was not liable for damages sustained by adjacent property owners, and that the improvement was the property of the city; that it alone was liable for damages to the property owner, as it alone had power to go upon the street and erect the viaduct. It is not, and cannot be successfully, contended that the city had ample power to construct this viaduct.

"For appellant it is claimed that the trial court erroneously refused to allow it to be shown on the cross-examination of the appellee Spoor whether he claimed damages for other lots owned by appellees in the same block as those for which the suit was brought, some fronting upon South Halsted street, and immediately south of the lots in question, and the others fronting on Emerald avenue, and separated from the lots in question by an alley sixteen feet wide; also in refusing to allow appellant to show by witnesses called for the defense that those same lots south of the lots in question on Halsted street and the lots fronting on Emerald avenue were benefited by the construction of the viaduct in question. So far as concerns the lots on Halsted street south of the lots for which damages are claimed, there was no evidence offered, either on the cross-examination of Mr. Spoor or by appellant's witnesses, so far as shown by the record, and therefore that part of the contention need not be further considered. As to the lots fronting on Emerald avenue, we are of the opinion that the evidence was properly excluded, because it is wholly immaterial in this case what benefits, if any, were caused by the construction of the viaduct to the lots on Emerald avenue, they being separated from the lots in question by an alley sixteen feet wide. It was held in the case of White v. Railroad Co., 154 Ill. 620, 39 N. E. 270, that, where a railroad company sought to condemn a part of a lot in one block, and the defendant, by cross petition, sought to collect damages to another block owned by him and separated by a street thirty

feet wide from the lot sought to be condemned, no such damages could be allowed. The court say: 'But it is said the two tracts of land were purchased to be used for one purpose, as one tract of land. Whatever may have been the intention or purpose in purchasing the two tracts of land can make no difference. The two tracts of land must be considered as they existed when the proceeding was instituted. At the time, they were separated by a public street. They were in no manner connected, and never could be connected without the consent of the city, which may never be obtained. They were not used for any common purpose as one tract of land. Two tracts of land might be so connected and used as to constitute but one tract, and in such a case, in a proceeding to condemn a part, it would be proper to consider the damages to the whole. But this record presents no such case.' To like effect, in principle, is the case of Railroad Co. v. Johnson, 159 Ill. 434, 42 N. E. 871. We see no reason why the principle of these cases is not applicable here. Appellant can in no way be concerned as to any alleged benefit which is claimed to have accrued to appellees as to lots owned by them not shown to be used so as to constitute one tract, but separated from the lots in question by a public alley. If such were the law, appellant could claim the right to set off any benefits accruing to property, however remote from the property which appellees claim to be damaged.

"It is claimed that apellees have been allowed damages to their property by reason of what counsel for appellant terms a diversion of traffic from South Halsted street, and, therefore, that the evidence of certain witnesses in their behalf should have been excluded from the jury. The witnesses called for appellees testified on their direct examination as to their opinion of what the damage was to appellees' property by reason of the construction of the viaduct in question, and by that alone. They were asked no questions whatever as to the several elements on which they based their opinion as to said damage. Plaintiffs nowhere, in making their case, claimed or sought to show as an element of their damage that there had been any diversion of traffic from Halsted street, and from the front of their property. In fact, Mr. Spoor, one of the appellees, said on his cross-examination that he did not think there had been any diversion of travel from the property if the traffic that goes on the cars was considered; that there was probably more travel on Halsted street than before the viaduct was put up, but it was all through travel, and that he did not say that a part of the damages to the lots in question had resulted by the diversion of traffic, and explained that the property, after the construction of the viaduct, was upon grade; that it was impossible for wagons or anything to stop on the approach to the viaduct; that the street cars ran very rapidly over it, and before the viaduct was built people who came from the stock yards, the main entrance of which

was very near to his lots, came out upon the street to this property, which was occupied for shops and business purposes, and which the viaduct had made it impossible to use; that the viaduct has placed a stone wall there in front of plaintiffs' property, which shut off the movement of people in the direction of plaintiffs' property from the stock yards. On recross-examination of this same witness counsel for appellant asked the witness if he could divide up the damage that had come to this property by reason of the construction of the viaduct, so that he could tell what part of the damage came from the diversion of trade and what had resulted from other causes, to which the witness replied that he could not tell and could not testify any amount. Counsel for appellant then moved to strike from the record the testimony of the witness as to the depreciation of the market value of the property by reason of the construction of the viaduct, because any damage by reason of the loss or diversion of traffic from the street, caused by the construction of the viaduct, could not be recovered. The motion was overruled, and, in our opinion, was properly overruled. City of Chicago v. Jackson, 88 Ill. App. 130. It is true, as held in the case of Hohmann v. City of Chicago, 140 Ill. 226, 29 N. E. 671, that diversion of customers from plaintiff's saloon was not an element of damage for which there could be a recovery, but it was not claimed in that case that access to plaintiff's premises was cut off, as it is claimed in the case at bar, which the court held was a matter which it was proper for the jury to consider in determining whether the plaintiff was entitled to damages. The appellant was entitled to show, on cross-examination, all the elements on which the witness based his opinion as to the damages caused by the construction of the viaduct; and if it appeared from the cross-examination that in part the opinion of the witness was based on matters improper for the jury to consider, that did not render the whole of the witness' evidence improper. In so far as the opinion of the witness was based upon an improper element of damage, that could be controlled by an instruction to the jury, which was in this case asked in the fifth and seventh instructions for appellant, which were given in a modified form, and which, in express terms, tell the jury that there could be no recovery of damages in the case by reason of the diversion of traffic as a result of the improvement, and that the jury were to determine, from the evidence and their view of the premises, whether or not the fair cash market value of the property was less after the viaduct was constructed, by reason thereof, than it was before it was constructed, and, if it was less, then their verdict should be for the plaintiffs, and, if not, their verdict should be for the defendant. Moreover, as we have seen, the main contention of the appellant was that, instead of there being a diversion of traffic, caused by the construction of the viaduct, it produced six witnesses, at least, who testified that the traffic in front

of the property had been greatly increased, and therefore that the value of the plaintiffs' property had been increased by reason of the construction of the viaduct; and it asked, and the court gave, instructions directing the jury that it had the right to consider the increase of traffic upon the street as an element of benefit to the property in question. Appellant thus having brought before the jury, by its cross-examination of appellees' witnesses, the element of diversion of traffic from plaintiffs' property, and having attempted to show by its own witnesses that there had been a great increase in traffic upon the street in front of the property, cannot now be heard to complain of the rulings of the court if an improper element of damage was brought to the consideration of the jury by its own action. Jeffery v. Robbins, 73 Ill. App. 353; Railroad Co. v. Wedel, 44 Ill. App. 215; Bolt Co. v. Major, 30 Ill. App. 276; Stone Co. v. Small, 80 Ill. App. 328; affirmed in 181 Ill. 366, 54 N. E. 995; Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450; Railroad Co. v. Latimer, 128 Ill. 163, 21 N. E. 7.

"Numerous other points are made by counsel as to the rulings of the court in refusing to exclude from the jury the evidence of other witnesses of appellees on the matter of diversion of traffic, but what has been above said in our opinion applies to these rulings with reference to these witnesses, and need not be here repeated. Counsel for appellant attempted to show by the cross-examination of plaintiffs' witnesses the values of property in the vicinity of the property in question and on other streets, but the evidence was ruled out. We think the matter was within the discretion of the court, and there was no error in excluding such cross-examination. And especially is this true because great latitude was given to counsel by the court in the cross-examination of the witnesses, in order to show their experience, and the basis upon which they formed their opinions as to the damage to the plaintiffs' property. It is claimed that the court erred in refusing to allow appellant's counsel to prove by one of its witnesses what the cost of the lots in question was at time of their purchase by appellees in September, 1894, taking as the sole basis of such cost the total consideration named in the deed, by which they acquired title to numerous other pieces and parcels of land besides the lots in question. The witness was, in effect, asked to apportion the total cost to the different lots. There was no error in this respect. It did not appear that the witness knew anything whatever as to the separate valuations put upon the lots in question by the parties to the deed, as distinguished from other property conveyed by the deed; and the consideration named in the deed was a lump sum for the property described therein. It is further claimed that the court erred in refusing to allow appellant's counsel to prove that there had been a general depreciation in the value of property in the city of Chicago since the year 1893 to the extent of

from twenty-five to sixty-five per cent. We think there was no error in this regard, because the proposed evidence was in no way limited to a time at or near the period of the construction of the viaduct.

"The claim is made that serious detriment was caused to the interests of appellant by divers remarks of the court to appellant's counsel in the course of the trial by way of comment upon his conduct in the trial, the character of the evidence introduced and sought to be introduced on behalf of the city, and in other respects, which it is claimed were calculated to prejudice the jury as to the defense made by the city. It is impossible to reproduce in this opinion, without unduly extending it, the many different remarks of the court complained of, and the proceedings and language of counsel leading up to the same. It seems sufficient to say that we have carefully read the portions of the record referred to in the abstract and briefs of counsel for both sides, and have reached the conclusion that the language and methods of counsel for appellant were calculated to annoy and irritate the trial judge; and, while some of the court's remarks to appellant's counsel in criticism of his conduct and commenting upon certain evidence offered and admitted were improper, they were caused by his annoying and harassing methods in repeatedly persisting in his efforts to get before the jury evidence which the court had repeatedly ruled was improper, and also by interposing, over and over again, objections to evidence which the court had overruled from time to time, and in delaying the progress of the trial by arguments of such objections after the court had ruled thereon.

"It appears from the record, though not abstracted nor referred to in any of the briefs, that the hearing of the cause, after it had proceeded for two days, was adjourned from day to day, for three consecutive days, because of the sickness of the trial judge. In the course of the trial, when appellant's counsel objected to the remark of the court that he was 'getting a lot of immaterial issues' before the jury, calculated to mislead them as to the true issue of the case, the court replied that the jury was not to consider anything said by the court except when he was excluding evidence, or something like that,—that the court was addressing its remarks to counsel; also, at the request of appellant's counsel, the court instructed the jury, by instruction No. 24, that it was not to 'consider any remarks of court or counsel during the introduction of the evidence in the course of the trial, or exceptions or objections made or taken by counsel upon either side, or the decision of the court upon any motions made by either of such counsel during the course of the trial, or decisions of the court in refusing to admit evidence offered by either side'; and the court added to the foregoing instruction the following words, viz.: 'The jury should ignore every consideration other than a desire to do right between the parties to this suit. It would

be highly improper for you to consider in any manner, or to permit your judgments to be influenced by, anything said by the respective counsel to each other, or by either counsel to the court, or by any remark made by the court to either one of the attorneys in this case. A court has no enemies to punish or favors to reward in a lawsuit, and this jury, I am convinced, will use their conscientious and best efforts to arrive at a verdict which will be based upon the evidence, aided by the instructions of the court, as given you in writing. Anything said by the court in discussing with counsel questions respecting the admissibility of evidence was not intended for your hearing, as the instructions which the court intends for the jury must be in writing; and it is your solemn duty to ignore oral remarks of the court, if heard by you, and to follow and be governed by this series of written instructions.' From all the foregoing considerations we are of opinion that there was no prejudicial error from the remarks of the court to counsel, and that no injury was done to the interests of appellant by its remarks during the course of the trial. We think that the trial judge endeavored to be fair and just as between the parties, and, if any injustice was done, it must be attributed to the course of appellant's counsel in the trial; and of this there can be no just cause of complaint.

"It is said there was error in the giving of appellees' second instruction, which is quoted in the statement preceding this opinion, because there was no proof that appellees were poor or rich men, or that the city of Chicago was bankrupt or otherwise. The evidence tends to show that appellees were rich men, but the instruction was given, no doubt, because of the statement of appellant's counsel to the court when he attempted to prove, on the cross-examination of the appellee Spoor, that the appellee Webb was a director in a corporation; that plaintiffs' counsel had gone into the pedigree of Spoor, and that he ought to be permitted to go into the pedigree of his joint owner, and to show his relation in business up to that time by cross-examination; to which the court replied that it was 'immaterial in this court whether Mr. Webb is a millionaire or the meanest pauper in America.' It is well and generally known that the city of Chicago has control of great wealth, and no evidence in that regard was necessary. We think there was no reversible error in this instruction.

"It is said that the third instruction should not have been given, because it was an abstract proposition of law, and was prejudicial to appellant. The abstract only shows the first sentence of this instruction, and there is nothing to indicate, either in the abstract or brief of appellant's counsel, that there was any part of the instruction omitted from the abstract. A reading of the omitted part shows the application of the first part of the instruction complained of to the facts of the case, and shows that there could be no reasonable

criticism of the instruction as a whole. Such methods are not creditable to counsel in presenting a case to a court of review. And in this connection it may be observed that appellant's counsel has pursued a like course with regard to an alleged erroneous ruling of the court in refusing to permit the witness Spoor to testify what the effect of the viaduct upon the property was by the simple elevation of the grade, independent of effects from other causes. The abstract shows (page 38) that an objection to this question was sustained. At page 206 of the record the witness was recalled for further examination, and on page 207 and the following pages of the record it appears that appellant's counsel was given an opportunity to cross-examine the witness fully, the objections to the particular question as to which complaint was made that the witness was not allowed to answer were withdrawn, and an opportunity given to have the questions answered by the witness. No reference is made by appellant's counsel in his brief to this part of the record. No other comment is necessary.

"It is said that the fifth and seventh instructions asked by appellant and given in a modified form, as appears from the statement preceding this opinion, should have been given as asked, and that the giving of them in the modified form did not cure the error of letting go to the jury the testimony as to traffic and business hereinbefore referred to, the remarks of the court upon the trial, and its critical reflections upon appellant's counsel. The instructions, and the modifications thereof by the court, speak for themselves, and what has heretofore been said we think sufficiently answers the criticisms of counsel.

"Complaint is also made of the fifth, sixth, seventh, and ninth instructions given for appellees, and that the fourth, sixth, and eighth instructions asked by appellant were refused. We have read all these instructions in connection with the other instructions given, both on the part of appellant and appellees, and think there is no reversible error in any of the rulings of the court in respect thereto. The jury was fully and fairly instructed upon the law relating to the case. The amount awarded for plaintiffs' damages is $500 lower than the lowest estimate made by any of plaintiffs' witnesses. The jury viewed the premises, and evidently, from such view and the testimony on behalf of the plaintiffs, must have wholly discredited the evidence of appellant's witnesses, none of whom admitted any damage to the property by reason of the construction of the viaduct, but maintained that it had increased in value all the way from $2,250 to more than $7,000. Such being the case, we think their verdict should not be disturbed. Mitchell v. Coal Co., 85 Ill. 566; Culbertson & Blair Packing & Provision Co. v. City of Chicago, 111 Ill. 651; Sanitary Dist. v. Cullerton, 147 Ill. 385, 35 N. E. 723; Railroad Co. v. Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R.

A. 422; Davis v. Railroad Co., 170 Ill. 595, 48 N. E. 1058; Cook & Rathbone Co. v. Sanitary Dist., 177 Ill. 599, 52 N. E. 870. In the Davis Case, supra, the court say: 'It appears that the jury examined the property and heard testimony, and they were authorized to take that testimony, in connection with their own judgment, into consideration in determining the just compensation, for the rule is, where there is a diversity of opinion and conflict of testimony among witnesses as to the value of the property proposed to be taken or damaged, and the jury have made a personal inspection, this court will not reverse on the ground that the damages are excessive, or inadequate, or that the evidence does not support the verdict, as the jury have a right to base their verdict to some extent upon their own examination of the property,'—citing several cases. In the Cook Case, supra, the court, after stating that the testimony was conflicting, and that the jury viewed the premises,—the case being condemnation by the sanitary district,—say: 'With such a diversity of opinion among the real-estate dealers, and such a conflict in the testimony, this court would not be justified in saying the evidence does not support the verdict, and especially when the verdict is undoubtedly based upon an examination of the property by the jury, as well as the other testimony in the case.' The judgment of the circuit court is affirmed."

WHEELER v. CITY OF DETROIT.

(Supreme Court of Michigan, July 2, 1901.)

[86 N. W. Rep. 822.]

Defective Sidewalk—Personal Injuries—Sufficiency of Notice of Claim.—Where a person injured by falling on a defective sidewalk serves a claim, and describes the location of the defect as on a certain side of a named street, between two other named streets, and the city receives and acts on the notice without objection, the notice is sufficiently definite as to the locality.

Same—Same—Admissibility of Parol Evidence to Prove Contents of Written Claim Which Has Been Lost.—Where the records of the city council show that they acted on and rejected a petition presented by plaintiff's father for compensation for an injury, and at the trial of an action to recover for such injury the city clerk was unable to find such petition, plaintiff may introduce parol testimony of its contents, though no formal notice to produce it has been served.

Irregular Exception to Remarks of Opposing Counsel Not to Be Considered.—Where defendant's counsel excepted to remarks of plaintiff's counsel in addressing the jury, without calling the attention of the judge thereto or taking any ruling thereon, such exception should not be considered.

Error to circuit court, Wayne county; Byron S. Waite, Judge.

Action by Ethel Wheeler, by next friend, against the city of Detroit. From a judgment for plaintiff, defendant appeals. Affirmed.

P. J. M. Hally (Timothy E. Tarsney, of counsel), for appellant.

Frederic T. Harward, for appellee.

HOOKER, J. The defendant has appealed from a verdict and judgment rendered against it in an action for negligence. The plaintiff, a young woman, is alleged to have stepped into a hole in the sidewalk upon one of the streets of the city, existing by reason of the loosening or removal of one or more of the boards of which the walk was constructed. Under the provisions of the charter, it was essential that a claim should be presented to the common council before suit. See Detroit City Charter, § 86; Springer v. City of Detroit, 102 Mich. 302, 60 N. W. 688; Id., 118 Mich. 69, 76 N. W. 122. Proof of the presentation of a notice to the law department of the city was made. This described the accident as occurring while she was walking on the sidewalk on the east side of Fifteenth street, between Lincoln and Poplar streets. It is claimed that this description of the place was not sufficiently definite. The records of the common council were offered, and showed that a petition was presented by Charles G. Wheeler, on behalf of Ethel Wheeler, for compensation for injuries suffered through a fall upon a defective sidewalk; that a committee reported that there was no legal liability, and a recommendation that compensation be denied, which report was accepted and adopted. It was objected that the petition referred to in these proceedings was not produced by the plaintiff. Thereupon it was shown that a petition was presented to the city clerk, that the clerk looked through his files in the witness' presence, and that he looked, and they could not find it. It was contended that this did not warrant secondary evidence of the contents of the petition. We think the testimony was competent. The paper was traced to the city, and, though no formal notice to produce it was given, application was made to the proper custodian, who was unable to produce it. Had a formal notice been given at the time of the trial, it would have been sufficient, subject to a reasonable delay, if, in the opinion of the court, one was required. The offer of the proof was tantamount to a notice, under the circumstances. There was no claim of surprise, or intimation that time was desired to contradict this proof. We think, also, that it was competent to permit the jury to find that the petition referred to this claim.

A more important question relates to the description of the place. We have recently held that, under the circumstances of the case, a limitation of the place to a point in front of a lot in a certain block was sufficient. Here the statement is that it is on a walk on the east side of Fifteenth street, between two other streets; hence, within a distance of not less than a block,—possibly many blocks. But presumptions are in favor of the validity of the action of the trial court, who might lawfully take judicial notice that these were public

streets. Porter v. Waring, 69 N. Y. 250. If, therefore, we conclude that this was a limitation to one block, is that sufficiently definite? In the recent case of Brown v. City of Owosso, 85 N. W. 256, we held that it was not the object of the lawmakers to require technical accuracy in a notice, and that one which fairly apprised the council of the required facts was sufficient, where it was accepted and acted upon without objection. We think the present case is fairly within the rule laid down, as it appears that the council did not ask for more specific information, but, by its consideration of the claim, allowed the plaintiff to infer that it was satisfactory.

Complaint is made of the language of the circuit judge in excluding certain testimony. The defendant's counsel sought to show by a truant officer that the girl was out nights, and by a physician that she had other ailments, and the judge evidently thought it an attempt to disparage her character. If it be thought that the judicial equilibrium was slightly disturbed, the effect of the offer, if intended to introduce such an element into the case, was well calculated to introduce it, for the testimony was not admissible for such a purpose. It is now contended that the offer had another object, but we do not discover that counsel apprised the trial court of such object. Had he done so, the court would doubtless have given full consideration to the question raised.

The record shows the following: "During the opening argument of plaintiff's counsel to the jury, defendant's counsel took exception to the following remarks: 'Mr. Harward: This crowd of detectives here for the city would as soon besmirch the reputation of a girl or a woman, if they could thereby win a verdict. They have brought in here everything which they could find to blacken her reputation, and then they couldn't prove anything.' This exception was noted, without the court's ruling upon the remark." It is said in plaintiff's brief, and not contradicted by the supplemental brief of the defendant, that the judge's attention was not called to these remarks, and the exception was noted without taking the ruling of the court. If this is so, the defendant is in no situation to raise the point. Bedford v. Penney, 65 Mich. 669, 32 N. W. 888; Hart Mfg. Co. v. Mann's Boudoir Car Co., 56 Mich. 565, 32 N. W. 820.

Several other points are raised, but we think none of them require discussion. We find no error, and the judgment is therefore affirmed.

GRANT, J., took no part in the decision. The other justices concurred.

BARRET *v.* CITY OF MOBILE *et al.*

(*Supreme Court of Alabama, April 18, 1901.*)

[30 So. Rep. 36.]

Action against City—Presentation of Claim a Condition Precedent—Complaint Must Aver Presentation.—Under the charter of the city of

Mobile, providing that no claim against the said city "shall be sued on until a statement thereof, giving date of accrual, name and residence of the original claimant and assignee, if any, circumstances and amount, shall have been filed with the clerk for consideration of the general council, and either rejected by them or held for sixty days without action" (Acts 1896-97, p. 563), no suit can be maintained against said city without first presenting the claim as thus provided by the charter, and it is necessary that the complaint in such action should aver a compliance with such statutory requirements.

Same—Same—Charter Provision Requiring Relates to Demands Ex Delicto as Well as Ex Contractu.—The requirements of the charter of the city of Mobile, "that no claim against the city of Mobile shall be sued on" until a statement thereof, in accordance with the directions contained in said charter, shall have been filed with the clerk for consideration of the general council, and either rejected by them or held without action for 60 days, relate to a demand arising in tort as well as *ex contractu*.

Pleading—When Matter of Authority Must Be Specially Pleaded in Answer to an Action for Trespass de Bonis Asportatis.—In an action of trespass *de bonis asportatis*, where the defendant undertakes to justify the alleged trespass under legal authority, such defense must be specially pleaded, and cannot be proved under the general issue; but, under the plea of the general issue, the fact that the defendant acted under supposed legal authority may be proven for the limited purpose of mitigating or preventing exemplary damages.

Same—Action of Trover—Matter of Authority as a Defense Need Not Be Specially Pleaded.—In an action of trover, a defense that the conversion or destruction of the property of the plaintiff involved in the suit was under legal authority and direction may be proven under the plea of the general issue in bar of the action, and it is not necessary to set up such defense by special plea.

Same—Conversion of Mule—Police Authority to Destroy Diseased Animals May Be Shown under General Issue.—In an action of trover to recover damages for the alleged conversion of a mule, where the defendant pleads the general issue, it is competent for the defendant to introduce evidence to show that the animal was killed in pursuance of a reasonable police regulation, in promotion of public health.

City Health Officer Cannot Order the Killing of Stock Affected with Dangerous Disease without Special Authority.*—In an action against a city health officer to recover damages for the killing of a mule, where there is evidence introduced for the defendant showing that said mule had an infectious and contagious disease, which was dangerous to man and beast, and that the mule was ordered to be killed by the health officer of the city wherein it was kept, but there was no evidence introduced to show that there was any regulation made by the city or special authority conferred upon said health officer in any legal mode, giving him the power to order the destruction of the animal, such killing is shown to have been unjustified, and the plaintiff is entitled to the general affirmative charge.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

Action by Kate W. Barret against the city of Mobile and others. Judgment for defendant, and plaintiff appeals. Reversed.

The complaint, as originally filed, contained three counts. The first count was for trespass, in the Code form, for

*Authority under police power to destroy diseased animals, see Miller *v.* Horton (Mass.), 10 L. R. A. 116, brief; Houston *v.* State (Wis.), 42 L. R. A. 39, brief; Tappen *v.* State, 146 N. Y. 44, 40 N. E. Rep. 499.

wrongfully taking one mule, the property of the defendant. The second count was in trover, and was in Code form for the wrongful conversion by the defendants of one mule. The third count of the complaint was a special count, and was in words and figures as follows: "(3) Plaintiff claims of the defendants one hundred and twenty-five dollars damages for that on, to wit, the 8th day of August, 1898, she was the owner of a mule, of the value of one hundred and twenty-five dollars. Plaintiff avers that the municipal Code of the city of Mobile provides that 'upon the complaint of the health officer that a horse has glanders and is dangerous to the health of man or beast, or that any animal is diseased and thus dangerous, or any object is a nuisance and dangerous to health and safety of man or beast in the city, the recorder shall take the evidence of two disinterested and reputable citizens, and may thereupon, if satisfied such complaint is well founded, in his discretion issue a warrant, directed to any police officer, requiring him to enter upon the premises, where such animal or object is, and under the direction of the health officer remove it, alive or dead, to a place of safety. Such warrant shall also authorize the officer, if so directed by the health officer for prudential reasons, to kill an infected animal before removal.' Plaintiff further avers that the defendant Rhett Goode was on the day aforesaid health officer of the said city of Mobile. Plaintiff further avers that on the day aforesaid the said defendant Rhett Goode, acting as such health officer for and on behalf of the said city of Mobile, ordered the said mule of plaintiff to be killed, and said mule was killed by a police officer in obedience to such order. Plaintiff further avers that there was no complaint made by said health officer to the recorder, as provided by said municipal law; nor was there any evidence taken before the recorder of disinterested and reputable citizens that said mule had glanders and was dangerous to the health of man or beast, or was diseased and was thus dangerous, as is also provided by such ordinance; nor was there any warrant directed by the recorder, after an investigation by him, to any police officer, requiring him to kill said animal, as is also required by law." To the entire complaint the city of Mobile demurred, upon the ground that the complaint fails to allege that said claim was presented to the general council of the city of Mobile as required under the charter of said city. This demurrer of the city of Mobile was sustained. Thereafter, upon motion of the city of Mobile, it was ordered that the cause be dismissed as to the city of Mobile. The defendant Rhett Goode then filed two pleas, which were as follows: "(1) The defendant Rhett Goode, for answer to the complaint, saith he is not guilty of the matters alleged therein. (2) And now comes the defendant in this cause, and for further plea in this behalf says actio non, because he says that said horse was afflicted with glanders, an infectious and contagious disease,

and that he ordered the same killed, as the executive officer of the board of health of Mobile county, as he was required to do under the laws of Alabama." Issue was joined upon these two pleas. The plaintiff introduced witnesses who testified that the mule belonging to the plaintiff, valued at from $150 to $200, was killed by one Gilroy, an officer of the city of Mobile; that when said Gilroy came to kill the mule he stated that he was acting under the orders of Dr. Rhett Goode, health officer of the city of Mobile. After the introduction of this testimony, the plaintiff moved the court to strike out the third count of the complaint, which was granted without objection on the part of the defendant. Thereupon the defendant moved the court for leave to withdraw his special plea, numbered 2, which motion was granted, without objection on the part of the plaintiff. The evidence for the defendant tended to show that the mule which was killed had a disease known as "acute glanders"; that the said disease was dangerous, both to man and beast, and was infectious and contagious; and that a veterinary surgeon reported the fact that the mule was so afflicted to the health officer of the city of Mobile, in which city the mule was kept at the time he was killed. Dr. Rhett Goode, the defendant, testified that a veterinary surgeon reported to him that a mule belonging to the plaintiff had the disease glanders; that thereupon he issued instruction to have the mule killed, provided that there was no objection on the part of the owners of the animal; that in so ordering he acted for the board of health of the city of Mobile, under the authority conferred upon the city by its charter; and that in giving said instructions to the sanitary officer to kill said mule he acted in the capacity of said health officer. There was no evidence introduced by the defendant to show that there was any special order issued conferring power upon him to have destroyed or killed an animal having a contagious, infectious, or dangerous disease within the corporate limits of the city of Mobile. Upon defendant offering the testimony showing his official character, and the fact that he was informed as to the mule in issue having glanders, and the circumstances under which he ordered the mule killed, the plaintiff separately objected, and moved to exclude such testimony. The court overruled each of such objections and motions, and to each of these rulings the plaintiff separately excepted. Upon the introduction of all the evidence the plaintiff requested the court, among other charges, to give the general affirmative charge in her behalf. The court refused to give the several written charges requested by the plaintiff, to the refusal to give each of which the plaintiff separately excepted.

John E. Mitchell, for appellant.
B. B. Boone, for appellees.

SHARPE, J. By the charter act of the city of Mobile (Acts

1896-97, p. 542), it is provided "that no claim against the city of Mobile shall be sued on until a statement thereof, giving date of accrual, name and residence of original claimant, and of assignee if any, circumstances, and amount shall have been filed with the clerk for consideration of the general council, and either rejected by them or held for sixty days without action." Id. p. 563, § 22. The word "claim," as used in this provision, is comprehensive enough to include charges against the city arising in tort as well as ex contractu. The legislative intention was to protect the city from expenses of unnecessary litigation by affording it opportunity to settle and discharge its liabilities without suit. The same necessity exists for such protection in respect to torts as in other claims, and, without applying the requirement to them, the legislative intention cannot be wholly carried out. The right to sue the city without first presenting the claim is taken away by the statute. In bringing suit, the plaintiff should show by his complaint a cause for which an action will lie. To that end, the complaint should aver presentation according to the statutory requirement. For want of such averment, the complaint in the present case was subject to the demurrer interposed to it as a whole.

We are aware that there is conflict in the authorities, both as to whether the word "claims" as used in statutes requiring presentation before suit applies to tort, and also as to the necessity of averring compliance with the requirement. We think, however, that our conclusions on both those questions are supported by the decision of this court made with reference to an analogous requirement respecting the presentation of claims against counties before suit, and found in section 13 of the present Code. See Schroeder v. Colbert Co., 66 Ala. 137; Shinbone v. Randolph Co., 56 Ala. 183.

Amendments of the complaint left it standing against the defendant Goode alone, on a count in trespass joined with a count in trover, and not guilty was the only plea. The two causes of action proceed on different theories, and are subject to dissimilar defenses.

In trespass de bonis asportatis, as in other species of trespass, a defense based on legal authority for the taking complained of is in justification of the act, and, like other pleas in confession and avoidance, must be pleaded specially; otherwise, the defense is not allowed to be proved (Womack v. Bird, 51 Ala. 504, s. c. 63 Ala. 500; 1 Chit. Pl. [16 Am. Ed.] 532), though the fact that the defendant acted under a supposed, though invalid, authority may, according to the more recent decisions of this court, be proven for the limited purpose of mitigating or preventing exemplary damages (Stephenson v. Wright, 111 Ala. 579, 20 South. 622; Boggan v. Bennett, 102 Ala. 300, 14 South. 742). In trover a valid authority for appropriation or destruction of property involved may be proven under the general issue and in bar of the action.

Gould, Pl. § 57; 9 Bac. Abr. 672; Young v. Cooper, 6 Exch. 259; Kline v. Husted, 3 Caines, 275; Pemberton v. Smith, 3 Head, 18; Miller v. Knapp (Pa. Sup.) 199 Atl. 555. In Gould, Pl., supra, it is laid down that "as the conversion, which is the gist of the action in trover, is ex vi termini a tortious act, which cannot in law be justified or excused, it is manifest that any plea alleging matter of justification or excuse (as a license from the plaintiff, an authority derived from the law, etc.) is equivalent to the plea of not guilty, since it must involve a denial of the conversion. There are decisions opposed to the admission of such a defense without a special plea, and the question seems not to have been expressly decided by this court, though, as favoring the rule we announce, there is an intimation in Hopkinson v. Shelton, 37 Ala. 306, where, in passing on a plea setting up that the property alleged to have been converted was taken under execution, the court said that, in view of our statute allowing a plurality of pleas, "it was no objection to the second plea that it amounted to the general issue. A conversion is necessarily wrongful, and cannot be justified. Where the appropriation is rightful, there is no conversion. Therefore a plea showing that fact directly contravenes the complaint, and is not in confession and avoidance, or in justification. Under the pleading in the present case, it was competent, under the count in trover and in bar of it, to show by proof, if it existed, that the animal was killed in pursuance of a reasonable police regulation, in promotion of the public health. Tied. Cont. Pers. & Prop. 828. The evidence actually introduced tending to show the defendant's official character, the information on which, and the circumstances under which, he acted in ordering the animal to be killed were admissible, under the count in trespass, as tending to show he acted in good faith, and as bearing on the question of exemplary damages. But the evidence did not tend to show an absolute defense to either count.

In a general way, the duties and authority of county health officers are prescribed by chapter 58 of the Code. The powers given them as executive officers in respect of the destruction of property to prevent the spread of infectious diseases are required to be exercised "under the direction and control of the county board of health and in accordance with the health laws of the state. Section 2436. The county board of health may investigate "cases of malignant, pestilential, infectious, epidemic and endemic diseases occurring in the county, and the causes thereof, and take such steps as may be necessary for their abatement or prevention." Section 2429. "The court of county commissioners, or the proper corporate authorities of any city or town, may, jointly or separately, invest the county board of health with such executive powers and duties as may be deemed necessary for the preservation and promotion of the public health, and for the prevention of the introduction or spread of contagious or infectious diseases;

such powers to be exercised, and such duties to be performed, under such rules and regulations as may be determined upon between such board and such court, or corporate authorities." Section 2431. And the charter of Mobile (section 21) provides that the general council "may make, ordain and declare such by-laws and ordinances for and concerning the removal of nuisances and the prevention and extinction of contagious or infectious diseases, and in giving effect to these powers may act in co-operation with the board of health." In the absence of some regulation made or special authority conferred by the board of health, the court, or the corporate authorities, the health officer of Mobile, as such, has no authority to destroy property, whether infected or not, except when acting under a warrant from a justice or mayor, as provided by section 2393. Here there was nothing to show that the defendant was authorized in either of the modes indicated, or in any legal mode, to order the destruction of the animal; consequently there was nothing to justify that action, or to devest it of a tortious aspect, and the plaintiff's right to recover was made out. Therefore the refusal to instruct the jury affirmatively in her favor was error, for which the judgment must be reversed. It is unnecessary to specifically pass on the other charges. Let the judgment be reversed, and the cause remanded.

LEBANON LIGHT AND MAGNETIC WATER CO. *v.* CITY OF LEBANON.

(*Supreme Court of Missouri, Division No. 2, June 11, 1901.*)

[63 S. W. Rep. 809.]

Ordinance Authorizing Contract for Electric Light—Irregularity in Election Adopting Such Ordinance.—Where there was no fraud, the holding in one ward, instead of in all the wards, of a city, of an election for the adoption of an ordinance authorizing a contract for electric lighting of a city, was an irregularity, and did not invalidate the election.

Same—Same.—Where, in the election for the adoption of an ordinance authorizing a contract for electric lights, the fact that many of the ballots voted did not contain the words "tax levy," while they were counted for electric light contract and tax levy, was a mere irregularity, which did not invalidate the election, there being no fraud.

Action Ex Contractu against City—Pleading—Question Raised—Objections.—Where, in an action on a contract with a city, the pleadings did not raise the question that no notice was given that an election for the adoption of an ordinance authorizing the contract would be held, defendant cannot object that there was no evidence of such notice.

Claims against City—Where Statute Prefers Certain Claims None Others Can Be Preferred over Judgment Claims.—Under Rev. St. 1889, § 4977, providing that the necessary expenses for maintaining a city government which have a preference over contract obligations are the reasonable salary allowed by law to the mayor, council, assignor, marshal, constable, attorney, and a reasonable police force of the city, it was error, in an action on a contract, to allow other items of expense, whereby the city funds applicable to the contract, and for which plain-

tiff obtained judgment, were reduced below the amount due on such contract.

Defendant Cannot Complain of Error in His Favor.--The error of the court being in favor of defendant, it cannot complain thereof.

Appeal from circuit court, Laclede county; L. B. Woodside, Judge.

Action by the Lebanon Light & Magnetic Water Company against the city of Lebanon. From a judgment in favor of plaintiff for less than the amount demanded, both parties appeal. Reversed on plaintiff's appeal.

This is an action by plaintiff, as assignee of the Lebanon Light & Water Company, against the city of Lebanon, for the rental of 23 arc lights, of 2,000 candle power each, furnished said city during the year 1897. On January 5, 1891, said city, by Ordinance No. 90, granted the Lebanon Light & Water Company the right, for a period of 20 years, to operate a plant for making and furnishing the city of Lebanon with electric light, and which also provided that said company and its assigns should during this period supply the citizens of Lebanon with electric light; and said city expressly agreed by said ordinance to pay said company and its assigns $3,000 per annum for 23 arc lights, of 2,000 candle power each; and the same to be payable quarterly, and, if not paid when due, to bear 8 per cent. from the time payments become due until paid. This ordinance was duly submitted to a vote at an election called for that purpose, and the trial court found that at said election said franchise was duly adopted, and became a binding contract on the city. The trial court decided that the plaintiff, out of the revenues and income provided by the defendant city for the year 1897, was only entitled to the sum of $2,214.40, and not the full amount contracted for, and that the balance of said revenues provided for said year was properly appropriated to the payment of the expenses of the city government for that year. The correctness of this ruling is the only question challenged by the plaintiff's appeal. The trial court, by declarations of law, found that the "actual income of the city of Lebanon for the year 1897 was $4,197.27."

Plaintiff asked the following declarations of law: "The court finds and declares the law in this case: That the contract entered into between the city of Lebanon and the Lebanon Light & Water Company is a binding contract on the said city, and, further, that the plaintiff should have judgment for three thousand dollars, and eight per cent. on deferred payments, for the 23 arc lights furnished defendant during the year 1897: provided, that the same could be paid out of the income and revenue provided by said city for the year 1897, after deducting therefrom the amount that might be necessary to pay the reasonable salary allowed by law and the ordinances of said city, if any, to the mayor, council, assessor, marshal, attorney, and a reasonable police force for the defendant city; and if the court shall find that the income

provided by the said city of Lebanon for the year 1897, after deducting the said expenses of the city government, leaves any sum whatever, the plaintiff is entitled to a judgment to an amount equal to such remainder. That, in estimating the necessary expenses to run the city government of Lebanon for the year 1897, only the following items will be considered and allowed,—that is to say, the salary allowed by ordinance of the city of Lebanon to its marshal, assessor, and for a reasonable amount to sustain a reasonable police force, which amount will be the sum actually expended in that year for the police force; and it appearing by the evidence in this case that the charge and payment of the other city officers were in fees, and that they received no salary for their services, the sums received by them as fees should be excluded from such estimate. The court declares that the rule, as applied to this case, for estimating the necessary expenses for the city of Lebanon for the year commencing on January 1, 1897, and ending on January 1, 1898, is laid down in section 4977 of chapter 63 of the Revised Statutes of Missouri for 1889, and is the reasonable salary allowed by law and ordinance of the city of Lebanon, if any, to the mayor, council, marshal, constable, attorney, and a reasonable police force for said city; and in this case, it appearing from the evidence that during the said year 1897 there was no salary allowed by law to the mayor, constable, and attorney of the city of Lebanon, and that they received no salary, the only necessary expenses for the year 1897 that should be allowed in this case are the amounts of salary allowed and received by the city assessor, marshal, and a reasonable police force, not to exceed the amounts actually received." The court refused to give these declarations of law, and the plaintiff duly excepted. The court then, of its own motion, gave the following declarations: "The necessary current expenses of said city, within the meaning of the foregoing instruction, are the reasonable amounts that said city would be required by law to pay under all laws and ordinances existing at the time of making such contract. Any person or corporation contracting with any such city for the purpose of furnishing electric lights will be deemed to have made said contract with the knowledge of the provisions of section 11, art. 10, of the constitution of the state of Missouri, and also with the knowledge of all laws and ordinances in force at the time of making such contract; and all reasonable sums that may be required to be paid by said city under the laws and ordinances that are in force at the time of making such contract will take precedence over such contract, and be a prior claim upon the revenues of said city for any year. The court further finds that the sums testified to by the witness Stebbins, of $1,982.87, paid, for current expenses of said city for the year 1897, were all reasonable amounts, and were paid under and by provisions of laws and ordinances that were in force at the time of making the con-

tract sued on, and the authorities of said city were justified in making such payments in advance of the claim of the plaintiff herein. The court further finds that there is the sum of $2,214.44 of the revenues and income of said town in excess of the current expenses of said town as above set forth, and that, under the evidence in this case, the plaintiff is entitled to recover said sum upon the contract sued on." To the giving of these declarations of law the plaintiff duly excepted. The only evidence in this case concerning the expenses of the city government for 1897 was the testimony of Clerk Stebbins. He testified that the amount, under the laws and ordinances of said city, allowed as salary to mayor, council, assessor, marshal, attorney, and a reasonable police force was the sum of $441, and that, after deducting that amount from the total revenues of the year 1897, there would remain the sum of $3,702.27. After unsuccessful motion for new trial, plaintiff appeals. Defendant appeals from the judgment of the court upon the ground that the election held for the adoption of said Ordinance No. 90 was null and void, as well, also, as the tax levied and collected in pursuance thereof, and that the judgment should have been for defendant.

Wallace & Nixon, for plaintiff.
J. W. Farris, for defendant.

BURGESS, J. (after stating the facts). It is claimed by defendant that, as it is a city of the fourth class, it is divided into three wards, and, as the election was held in only one ward, it was in violation of the statute, and that as many of the ballots voted were not in accordance, in that they did not contain the words "and tax levy," while they were counted "for electric light contract and tax levy," the election was void, and the contract without authority. But these were, at most, but irregularities, and, in the absence of fraud, did not vitiate the election. State v. Town of Westport, 116 Mo. 582, 22 S. W. 888.

Defendant also asserts that there was no evidence adduced at the trial that notice of said election would be held was given by the mayor, but no such question was raised by the pleadings. All of the defenses were special defenses, and it is not alleged in any of them that such notice was not given, and the point cannot be raised outside of the record.

It is further insisted by defendant that the contract to pay $3,000 per annum was clearly a contract in excess of the annual income and revenue for any such year, and was not authorized by the voters in the manner required by law, and was in conflict with the constitution and statutes of this state. The total income and revenue of the city for the year 1897 was $4,197.27, which sum, less the necessary expenses to run the city government for that year, and any amount not in excess of the amount of plaintiff's claim, if any, plaintiff was entitled to judgment. What were necessary expenses of maintaining the city government, specified in section 4977, Rev. St. 1889, as those which

should have the preference, are "the reasonable salary allowed by law to the mayor, council, assessor, marshal, constable, attorney, and a reasonable police force of said city" (Webb City & C. Waterworks Co. v. City of Carterville, 142 Mo. 101, 43 S. W. 625; Id., 153 Mo. 128, 54 S. W. 557); and, while the evidence showed that these expenses only amounted to $444, the court allowed a number of other items of expense, including those before mentioned, amounting in the aggregate to the sum of $1,913.96, and deducted that amount from the $4,197.27, the total net revenues, and rendered judgment for plaintiff for $2,214.40, and in so doing committed error. But this was an error in favor of defendant, of which it has no right to complain.

The contention that the election was not held and conducted in substantial compliance with the requirements of article 10, §§ 11, 12, of the constitution of this state, is not, we think, sustained by the record.

Our conclusion is that defendant's appeal is without merit, but that the court erred to the prejudice of plaintiff, for reasons indicated, in refusing the declarations of law asked by it in regard to what were the necessary expenses of the city government for the year 1897, and in declaring the law to be otherwise. We therefore reverse the judgment and remand the cause, with directions to the court below to enter up judgment in favor of plaintiff for the amount of its claim and interest.

SHERWOOD, P. J., and GANTT, J., concur.

LEBANON LIGHT AND MAGNETIC WATER CO. *v.* CITY OF LEBANON.

(*Supreme Court of Missouri, Division No. 2, June 11, 1901.*)

[63 S. W. Rep. 811.]

Action against City—Proceedings of City Council Must Be Proved by Record—Parol Evidence Inadmissible.—Since Rev. St. 1889, § 1601, requires the board of aldermen to keep a journal of its proceedings,—the yeas and nays of the members on any question to be entered on request of any two members,—in an action on a contract for furnishing water to a city parol evidence is not admissible to show that an ordinance was passed by the council directing an election to be held to adopt such contract; it not appearing on the journal or records of the city that such ordinance was passed.

Appeal from circuit court, Laclede county; L. B. Woodside, Judge.

Action by the Lebanon Light & Magnetic Water Company against the city of Lebanon. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action by plaintiff, as assignee of the Lebanon Light & Water Company, to recover of the defendant, a city

of the fourth class, the sum of $720 and interest, for the rental of seven hydrants furnished to the defendant city by plaintiff from the 15th day of March, 1896, to the 1st day of January, 1898, at the rate of $420 per annum. The facts are about as follows: On the 1st day of September, 1890, the board of aldermen of defendant city, by an ordinance duly passed, numbered 86, granted to the Lebanon Light & Water Company and its assigns the right to construct, operate, and maintain in said city a system of waterworks for a period of 20 years, and to supply said city and its inhabitants with water. By section 10 of said ordinance it is provided that the city of Lebanon would rent of the light and water company seven fire hydrants, for $420 yearly rental, to be paid in semiannual installments, on the 1st day of January and July of each year; deferred payments to bear 8 per cent. interest from the time they were due until paid. The Lebanon Light & Water Company accepted the terms of the contract, and complied fully with all its terms and conditions. It proceeded to erect, and did erect, a system of waterworks for the city. It expended large sums of money in mains, hydrants, standpipe, excavation of wells, etc., at an expenditure of some $20,000. It constructed the seven fire hydrants to furnish water to the city for fire purposes, which the city duly accepted and took possession of. The Lebanon Light & Water Company and the plaintiff, successor and assignee, continued to furnish the city of Lebanon with water in accordance with its agreement. While an election was held in pursuance of said ordinance in the defendant city on the 16th day of September, 1891, at which said ordinance was submitted for ratification to the qualified voters of said city, and was in fact adopted at said election by a vote of 264 for to 3 against, it is claimed by defendant that no ordinance was in fact passed by the city council calling said election. An ordinance was in fact presented to the city council calling an election for the 16th of September, 1890, for a vote upon said Ordinance No. 86, and was duly adopted and signed by the mayor of the city, but it was never spread on the journal of the city.

The court (a jury being waived), over the objection and exception of plaintiff, declared the law to be as follows: "(1) The court declares the law to be that the city authorities of the city of Lebanon had no right to contract with plaintiff's assignor for the purpose of furnishing water for said town without there first being an ordinance passed by the city council of said city authorizing and directing an election to be held to vote upon such contract; and, if it does not appear upon the journal or records of said city that the ordinance was passed by the said city council of said city providing for an election for the purpose of voting upon said contract, parol testimony cannot be introduced to prove the same, and the election held in said city to vote upon the said contract is absolutely void, and did not authorize the making of such

contract, or the ratification thereof. (2) Even though the election to ratify the contract between the city of Lebanon and the plaintiff's assignor for the furnishing of water for the said city was valid, yet if it further appears that the said plaintiff also holds a contract with the said city for the furnishing of lights for said city, and that the amount claimed by plaintiff under said contracts for furnishing lights and water for said city for the year 1897 is in excess of the revenue and income of said city for the year 1897, and if for the year 1897 the authorities of said city have levied a tax to the full amount prescribed by section 2, art. 10, of the constitution, and if it further appears that, in the action by the plaintiff against said city for such light, plaintiff has recovered the full amount of the revenues of said city, as above set forth, for the year 1897, after deducting the necessary current expenses for said city for said year, then they cannot recover any additional amount upon the contract sued on, notwithstanding the fact that the water contract may have been made prior to the light contract. (3) If it appears from the evidence that the said plaintiff sued the city defendant for furnishing lights to said city for the year 1896, and recovered in said suit the full amount of the revenues of the said city for said year, after deducting necessary current expenses for said city for such year, and if it further appears that for the year 1896 the tax levy in said city was to the full extent authorized by section 2 aforesaid of the constitution, then plaintiff cannot recover anything in its suit for the water furnished for the year 1896." Judgment was then rendered for defendant, from which plaintiff, after unsuccessful motion for a new trial, appeals.

Wallace & Nixon, for appellant.

J. W. Farris, for respondent.

BURGESS, J. (after stating the facts). As no declarations of law were asked by plaintiff, the only questions presented by this appeal for consideration are with respect to the declarations of law given by the court of its own motion. By the first of these it was ruled that, as it did not appear upon the journal or records of defendant city that an ordinance was passed by the city council of said city providing for an election for the purpose of voting upon said contract, parol testimony could not be introduced to prove the same, and that the election held in said city to vote upon said contract was absolutely void, and the city authorities without authority to make the contract or to ratify the same. By section 1601, Rev. St. 1889, it is provided that "the board of aldermen shall keep a journal of its proceedings and the yeas and nays of the members on any question shall be entered at the desire of any two members." And under a similar statute it was held in the case of Stewart v. City of Clinton, 79 Mo. 603, that parol evidence was not admissible for the purpose of showing the existence of a town ordinance; that the "acts and ordinances of such corporation are evidenced by the

entries in such journal." 1 Dill. Mun. Corp. § 310; 1 Greenl. Ev. (14th Ed.) § 86. The city council of a city of the fourth class is, to all intents and purposes, a legislative body; and, when acting within the limits prescribed by its charter and the constitution and laws of the state, its acts are as valid and binding as an act of the legislature of the state, which is also required by the constitution to keep a journal (sections 31, 32, art. 4); and it will hardly be contended by any one that parol evidence would be admissible for the purpose of showing the existence of a bill in that body of which the journal contained no evidence, especially in the absence of the bill itself,—as in this case, the ordinance. The other declarations of law are erroneous for the same reasons that similar declarations were condemned in the case of Lebanon Light & Magnetic Water Company v. City of Lebanon (not yet officially reported) 63 S. W. 809. But, as the conclusion reached renders it impossible for plaintiff to recover, we affirm the judgment.

SHERWOOD, P. J., and GANTT, J., concur.

ADAMS, State Revenue Agent, *v.* JACKSON ELECTRIC RY., LIGHT & POWER CO.

(*Supreme Court of Mississippi, March 25, 1901.*)

[30 So. Rep. 58.]

Money Forfeited to City by Street Railway for Failure to Comply with Franchise—Money Appropriated to Street Railway in Violation of Constitutional Provision.—Money forfeited to a city for a failure to comply with a franchise becomes the property of the city for general purposes, and a donation thereof to another company completing the work of the first company was void, as violating Const. § 183, prohibiting any county, city, or town from making appropriations in aid of any railway or other corporation or association.

Same—Same—Such Money Belongs to City and May Be Recovered by State Revenue Agent.—Money forfeited to a city for failure of a street-railway company to comply with a franchise, and improperly donated by the city to another company, belongs to the city, and the state revenue agent may recover it from such company.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by Wirt Adams, state revenue agent, against the Jackson Electric Railway, Light & Power Company, to recover money paid the defendant by the city of Jackson. From a judgment in favor of defendant, plaintiff appeals. Reversed.

In 1897 the city of Jackson granted to one McKisson and his associates, under the partnership name of the Jackson Railroad & Light Company, a certain franchise for the purpose of establishing an electric light plant in the city. The city entered into a contract with the Jackson Railroad & Light

Company, which contract provided that the company should build and put in operation the plants provided for in these grants within a specified time, and that the said company should make a deposit of $1,500, to be forfeited to the city in case of default, which amount was deposited by the company. This company having failed to build the plants within the time required by the contract, and wholly making default, the board of mayor and aldermen, by proper ordinance, declared the forfeiture of the $1,500 to the city of Jackson. In April, 1898, identical franchises and contracts as the above were granted by the city of Jackson to another company, composed of different persons, under the partnership name of the Jackson Light, Power & Railroad Company; the city at the same time agreeing with the said new firm that on the completion of the plants required by the franchise the city would pay over to the new company the $1,500 deposited by the Jackson Railroad & Light Company, and declared forfeited to the city. Before the completion of the plants the Jackson Light & Railroad Company was merged into a corporation known as the Jackson Electric Railway, Light & Power Company, to which corporation the Jackson Light, Power & Railroad Company assigned all its rights. On the completion of the plants by the Jackson Electric Railway, Light & Power Company, the mayor and board of aldermen of the city of Jackson, by ordinance, ordered the $1,500 which had been declared forfeited to the city paid over to the said company, which was done. The state revenue agent then brought this suit to recover this $1,500 paid by the city to the said electric railroad company. The defendant demurred to plaintiff's declaration, setting out, among other grounds, the following: "That the revenue agent had no right to maintain this action, and that the declaration does not state a cause of action." Defendant's demurrer was sustained, and plaintiff appeals.

Harper & Potter, for appellant.
Williamson, Wells & Croom, for appellee.

CALHOON, J. From this record and the briefs of counsel on both sides marked as these briefs are by signal ability, two questions appear: (1) May money, the property of a city, the fruit of a forfeiture by one company of its contract to construct a street railway, etc., be donated by the board of mayor and aldermen to another company, on and after its completion of such work, under a contract between it and the city having no reference to that fund?. (2) May such money be recovered from such company so receiving such donation by the state revenue agent for the use of such city? After the most careful consideration, we answer the first question in the negative, and the second in the affirmative. When the forfeiture occurred, the money became the property of the city, although it was in the hands of its custodian. It belonged to the city, arising out of contract with it, because of breach of agreement with it to build the the railway, etc., under the

general municipal powers conferred by Code, §§ 2931–2933. The deposit of the money was in lieu of bond for performance, and on the breach the money became the city's for general purposes, and subject to the legislative power of the municipality, as would any other public fund occupying the same position, when put in the municipal treasury as money had for taxes, sale of licenses, or any other source of public revenue. Upon its grant of franchise to build a street railway, etc., the city might require a cash consideration, and this cash would be received in its governmental capacity. To secure performance in the instant case, the city required a cash deposit, and this, on forfeiture, fell under the power and control and disposition of the city in the exercise of its governmental functions, just as any other matter pertaining to the general welfare of the whole population. The fund came, in fact, out of the exercise by the city of its governmental power over its public streets. The money, in contemplation of law, was in the city treasury, although in fact in the hands of a depositor therefor. The resolution directing its donation to appellee was under, if under anything, Code, § 3003, which requires that "all expenditures of money for any purpose whatever, shall be in pursuance of a specific appropriation made by order, and in no other manner." In the case at bar this was an appropriation of the money of the city to a corporation, and so in direct and palpable violation of section 183 of our constitution. It follows that the appropriation here was void, and no title to the money passed to the appellee; and, because the money was the money of the city, a cause of action accrued to the state revenue agent to recover it. Adams v. Railroad Co., 76 Miss. 714, 25 South. 667. Reversed, demurrer overruled, and remanded.

CITY OF DANVILLE *v.* ROBINSON.

(*Supreme Court of Appeals of Virginia, June 20, 1901.*)

[39 S. E. Rep. 122.]

Defective Sidewalk—Councilman May Recover for Personal Injuries Though Prohibited from Contracting with City.—Laws inhibiting a councilman from contracting with a city do not prevent his recovering for injuries from a defective highway therein.

Same—Councilman Not Chargeable with Notice of Defect.—One injured by a defect in a sidewalk of a city bridge is not chargeable with notice of the defect merely because he is a councilman.

Same—Whether Councilman Sustaining Personal Injuries Chargeable with Negligence for Failure to Have Same Repaired.—One is not chargeable with negligence in the failure to repair defective sidewalks in a city bridge, so as to prevent his recovery for injury therefrom, merely because he is a councilman, he not having been charged with the duty, or given the means or power, to make the repairs, or been a member of the street and bridge committee, and having, because of inability to attend, been at none of the council meetings at which the matter of repairs was brought to the attention of the council, except one at which the report of such committee was filed and went over under the rules.

Same—Contributory Negligence.—One who starts to walk across a

bridge, at night, in the driveway, because it is lighter, is not chargeable, as matter of law, with contributory negligence, because on the approach of teams he goes onto the sidewalk, where he is injured from a defect therein.

Error to corporation court of city of Danville.

Action by J. D. Robinson against the city of Danville. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry R. Miller, for plaintiff in error.

Peatross & Harris and Christian & Christian, for defendant in error.

CARDWELL, J. This is a suit brought in the corporation court of the city of Danville by J. D. Robinson to recover damages for injuries to him, caused, as is alleged, by the negligence of the city in not keeping its streets, walkways, etc., in a reasonably safe condition, and the verdict and judgment is for the plaintiff for the sum of $1,500, to which judgment the defendant city was awarded a writ of error by this court.

Forming a part of Main street, the most public thoroughfare through the city of Danville, in almost continuous use day and night, is an iron bridge spanning Dan river. The parts of the city lying on either side of the river are connected by this bridge, which is about 840 feet long, and as a highway across the river consists of a wagon or carriage way 22 feet wide, with a sidewalk 5 feet wide for the use of pedestrians on each side of the wagonway. The floors of the wagonway and of the sidewalks and the sills on which they rest are of wood; the rest of the bridge is of iron and stone. There is no partition separating the wagonway from the sidewalks on either side, except the iron uprights of the framework of the superstructure of the bridge. On the occasion of the injuries for which this suit is brought, the defendant in error (plaintiff below), about 9 o'clock at night, was going from that portion of the city lying on the south of the river to his home on the north side. He entered upon the bridge on the east or right side thereof, and walked in the wagonway, because better lighted, as he says, till about two-thirds of the way across, when he discovered that a carriage following was gaining on him, and a wagon going in an opposite direction traveling on the west side of the bridge approaching; whereupon, and just as the wagon passed him, he stepped upon the sidewalk to his right, and, after walking thereon a distance of some 50 or more feet, one of the planks of the sidewalk gave way, or turned, letting his foot through the floor, and throwing him down, breaking his leg, and causing him other injuries.

Plaintiff in error, the city of Danville, had exclusive control of the bridge; it was wholly within the corporate limits of the city; and by its charter the city was charged with the duty of keeping the bridge in repair, and in a reasonably safe condition for the use of persons traveling over it.

August 25, 1896, the committee selected by the city's coun-

cil, and known as the "street and bridge committee," reported to the council that the sidewalks on the bridge were in an unsafe condition and recommended that the committee be authorized to expend $1,550 in repairing them. With this report was filed a report to the city's engineer, to the effect that, while the sidewalks of the bridge were not then dangerous, it was unsafe to allow them to be continued in use through the winter without renewal. Under the rules of the council, the report of the committee had to lie over 10 days, and no action was taken thereon till December 14, 1896, when it was recommitted to the committee for further investigation, with the view of having the cost of the repairs to the sidewalks of the bridge done at less expense than as proposed by the committee. At a meeting of the council January 12, 1897, the committee again reported that the costs of the repairs to the sidewalks could not be reduced below the estimate in their former report, specifying the unsoundness of the sills on and along which the handrailing runs, as being the special cause of danger. It was then provided that $20 or $25 be expended to put up an inner railing along the sidewalks to prevent persons from coming in contact with the outer iron railing, and thus relieve the situation. This was done, and at intervals between that time and September, 1898, when defendant in error received his injuries, the decayed planks on the sidewalks at different places were taken out, and new planks put in their place; but the sills upon which they rested were not renewed, although the council were informed by its street and bridge committee, and by the city's engineer in 1896, that they were rotten, and in an unsafe condition, which was not an open and obvious danger to pedestrians crossing the bridge. It appears that the immediate cause of the injuries sustained by defendant in error was the decayed condition of the sills under the sidewalks of the bridge, as the plank which gave way and let him through the floor would not have done so had not the sill to which the opposite end was nailed been so decayed that it would not hold the nails.

Defendant in error was a member of the city council from July, 1896, till after this accident to him, but was at none of the meetings of the council at which the matter of the repairs to the sidewalks of the bridge was brought to the attention of the council except that of August 25, 1896, when the report of the street and bridge committee was filed, and went over under the rules; and he was at no time a member of that committee, nor had any duties to perform as a member of the council which brought to his special attention the condition of the streets and bridges of the city.

It is contended that defendant in error cannot, in any event, be allowed to recover in this action: First, because he was a member of the council from the time that the defects in the sidewalks of the bridge were first brought to the notice of the council till after the accident to him; and, second, because a

councilman is not allowed to contract with his city, such contracts being, under the charter of the city and the general law of the state, void.

The authorities cited in support of this second proposition have no sort of application to this case, and those relied on to support the first do not sustain the contention. They are Todd v. Inhabitants of Rowley, 8 Allen, 51; Wood v. Inhabitants of Waterville, 4 Mass. 422, and the same case in 5 Mass. 294. The last two named only hold that a surveyor of highways may recover against his town damages happening to him through a defect in the highway, unless the defect arises from the surveyor's own neglect; in other words, that when a surveyor of highways, obliged by law effectually to repair the ways within his district, who has the means with which to do so placed at his disposal, or can obtain such means by applying to his town authorities, and sustains an injury by reason of his neglect of duty in these respects, he cannot recover in damages.

In Todd v. Inhabitants of Rowley, supra, it was held that a city, whose officers, in repairing a bridge, though acting in the honest exercise of their discretion, narrow the space for the passage of the water so as in times of freshet to set it back upon a mill, is liable for the injury thus occasioned, in an action of tort, even if the owner of the mill was a member of the committee of the city council on whose report the alteration was made. The opinion by Shaw, C. J., says: "That for the default in adopting a plan for the bridge, not contrived with sufficient skill and with a proper regard to the volume of water, the strength and rapidity of the current at all seasons, and the capacity of the waterways to discharge it, the members of the committee cannot be held personally estopped from asserting their rights."

There is nothing in the relation that defendant in error bore to the city government of Danville, when he sustained the injuries complained of, that makes the principle enunciated in Wood v. Inhabitants of Waterville, supra, applicable to his case. He was not charged with the duty, and given the means and power, to repair or renew the sidewalks of the bridge in question and neglected it. He was not even a member of the street and bridge committee of the council, which had special supervision of the streets and bridges of the city, but only one of the seventeen members of the council.

Whether or not defendant in error was guilty of negligence contributory to his injury was a question for the jury under proper instructions of the court.

The court gave five instructions, offered by defendant in error, to all of which plaintiff in error excepted, and gave four out of five instructions asked for by plaintiff in error.

The instructions given by the court correctly propound the law as to the liability of the city to persons lawfully using

bridges constructed as a part of its highways or streets for injuries caused by the negligence of the city in keeping them in a reasonably safe condition, and that defendant in error could not recover unless he was exercising reasonable and ordinary care for his own safety in passing over and along the sidewalk of the bridge when he was injured.

It was in evidence that defendant in error, in 1869, broke the leg that was injured by the accident complained of in this suit, and it is argued that defendant in error's third instruction is erroneous, because it fails to direct the attention of the jury to a proper discrimination between the injuries arising out of the two accidents, and to the necessity of excluding from the estimate of damages the injuries to the leg resulting from the first accident.

The instruction is not amenable to the objection. It properly directed the jury as to the damages they might allow under the evidence in the cause, and they could not have done otherwise than consider all the evidence before them as to the damages sustained by defendant in error resulting from the injuries for which this suit was brought.

The objection urged as to the fourth instruction for defendant in error proceeds upon the erroneous theory that he was, by reason of his being a member of the city council, to be held, as a matter of law, to have had notice of the defective condition of the sidewalks of the bridge, and therefore could not recover in this action.

Travelers are not forbidden by the law to use a public highway because its condition is unsafe, although that be known to them, unless the unsafe condition is such as to make the danger obvious and imminent. Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727, and authorities there cited.

The fifth instruction asked for by plaintiff in error and refused by the court sought to tell the jury, in effect, that, because the defendant in error was a member of the city council from the time the defect in the sidewalks of the bridge was first brought to the notice of the council till after this accident, no cause of action accrued to him.

It follows from what has already been said that this instruction was properly refused.

We are further of opinion that the instructions given by the court fully and fairly submitted the case to the jury, and could not have misled them to the prejudice of the plaintiff in error.

In considering the remaining assignment of error, which is to the refusal of the court to set aside the verdict of the jury and grant a new trial, the full statement of the case already made renders it unnecessary for us to go fully into the evidence.

No evidence was offered to show negligence on the part of the defendant in error touching the matter of repairing the sidewalks of the bridge. It is shown that when he was absent

from the meetings of the council it was because of his being so situated that he could not attend. It is conceded that the sidewalks of the bridge were in August, 1896, in an unsafe and dangerous condition, and so remained until after the happening of this accident, with the full knowledge on the part of the officials of the city whose duty it was to see to their repair or renewal. It is clearly shown that the danger to pedestrians passing over the sidewalks of the bridge was not by reason of the condition of the planks thereon, but by reason of the decayed condition of the sills upon which they rested, which defect was not open and obvious to pedestrians using the sidewalks.

The only negligence on the part of the defendant in error at the time of his accident contended for is his being in the wagonway, and going upon the sidewalk, when, by remaining in the wagonway, he could have passed over the bridge safely. His uncontradicted statement is that he was walking in the wagonway because it was better lighted, and only left it to go upon the sidewalk because of the near approach of a carriage in his rear; that, as he had noticed new plank put at a number of places in the sidewalks, and other repairs to them, he supposed them to have been put in a safe condition for use by the public, and that he was walking at a moderate gait, exercising ordinary and reasonable care, when he was injured.

Conceding that it would have been safer for defendant in error to have continued upon the wagonway, whether or not he was, by leaving it, and going upon the sidewalk, guilty of contributory negligence, as the proximate cause of his injury, was a question for the jury to determine from all the facts and circumstances of the particular occasion. Kane v. Railroad Co., 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478.

The state of facts presented by the evidence is, at least, such that reasonable men may fairly differ upon the question as to whether there was negligence or not, and, this being the case, the determination of the matter by the jury should not be disturbed. Railroad Co. v. Ives, 144 U. S. 419, 12 Sup. Ct. 679, 36 L. Ed. 485; Kimball v. Friend's Adm'r, 95 Va. 125, 27 S. E. 901.

The judgment complained of must be affirmed.

Affirmed.

DISTRICT OF COLUMBIA, Plff. in Err., *v.* HOSEA B. MOULTON.

(*Argued April 9, 10, 1901. Decided May 27, 1901.*)

[21 Sup. Ct. Rep. 480.]

Steam Roller in Street—Negligence—When a Question for the Court.—The question of negligence or no negligence is one of law for the court, where but one inference can reasonably be drawn from the evidence.

Same—Same.—Leaving a steam roller close to the curb on the street

where it is in use, for two days after it is broken, without any change in its appearance to enhance the danger of frightening animals, except by putting over it the usual canvas cover to protect it from the weather, does not present a case of negligence for the jury, when a horse becomes frightened by its presence in the street.

Same—Mere Presence of Roller Sufficient Warning to Travelers.—No other notice to travelers of the presence of a steam roller on a street is needed than a view of the roller itself, when it can be seen in ample time to avoid it.

In Error to the Court of Appeals of the District of Columbia to review a decision affirming a judgment for plaintiff in an action for negligence. Reversed.

See same case below, 15 App. D. C. 363.

Statement by MR. JUSTICE WHITE:

This action was begun by the defendant in error in the supreme court of the District of Columbia. In substance he asserted in his declaration a right to recover from the District of Columbia a specified sum, upon the ground that by its negligence, on November 26, 1896, he had sustained serious personal injury. The negligence averred consisted in this,—that for a space of two days prior to and including the date named the District had negligently and knowingly left upon a public highway known as Park street a large steam roller, which was calculated to frighten horses of ordinary gentleness; and while plaintiff was driving along said street, with due care, in a carriage drawn by a horse of that disposition, the animal was frightened and rendered unmanageable by the steam roller, and in the struggles of the horse one of the wheels of the carriage was broken, plaintiff was thrown out upon the ground with great force, and he sustained the injuries for which recovery was asked. Defendant filed a plea of the general issue.

The evidence most favorable to the contention of the plaintiff tended to show the following: Park street is a public highway in the northwest section of the city of Washington, commencing at Fourteenth street and running westwardly. For several days prior to the accident in question a steam roller had been used in connection with the work of resurfacing Park street with macadam. This roller was of the kind usually employed in constructing macadamized gravel roads. It had three wheels, the tread of the rear wheel being about 8 feet, which was its extreme width. The machine was about 8 feet long and about 5 or 6 feet high. The smoke-stack was a little higher than the other part of the machine. While the roller was in use, on the forenoon of the day before the accident hereinafter referred to, it "broke down." The nature of the injury to the roller does not appear, otherwise than as it may be inferred, from the fact that the roller was subsequently removed by horse power, that the machinery was simply disabled. On becoming out of order, the roller was placed close to the south curb of Park street, from 20 to 50

feet west of Pine street—a street 50 feet in width—and distant about 900 feet westwardly from Fourteenth street. Over the roller was placed a canvas cover. The roadway proper, at the point where the roller was stationed, was about 28 feet wide, and there was ample room for the passage of vehicles between the roller and the northerly side of Park street.

About 3 o'clock on the afternoon of November 26, 1896 (Thanksgiving Day), plaintiff drove into Park street from Fourteenth street, and, as he did so saw the steam roller. The horse he was driving was one which the plaintiff had owned for several years, was regarded as of an ordinarily gentle disposition, and had several times been driven safely past steam rollers when they were in actual operation. Plaintiff guided his horse, intending to pass by the roller in the space to the right thereof, but on approaching Pine street the horse became restive from the flapping of the canvas cover on the roller, or from some other cause, and when about opposite the middle of Pine street became unmanageable, reared, and upset the vehicle, throwing out and injuring the plaintiff. The evidence also tended to show that other horses in passing the roller had exhibited fear.

The case was tried to a jury, and resulted in a verdict for the plaintiff. On appeal the judgment was affirmed by the court of appeals of the District. 15 App. D. C. 363.

Messrs. Andrew B. Duvall and Clarence A. Brandenbury for plaintiff in error.

Messrs. A. S. Worthington and Charles L. Frailey for defendant in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

That the District of Columbia is not an insurer of the safety of travelers upon its streets is, of course, unquestioned. This being so, we think the lower courts erred in upholding the liability of the District for the injuries sustained by the plaintiff, under the circumstances disclosed in the record.

The steam roller in question had been brought to the place where the accident occurred, for a lawful purpose, viz., that of performing a duty enjoined upon the District to keep in repair the streets subject to its control. The use of an appliance such as a steam roller was a necessary means to a lawful end,—a means essential to the performance of a duty imposed by law. It must therefore follow that if in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is damnum absque injuria. Lane v. Lewiston, 91 Me. 292, 294, 39 Atl. 999; Morton v. Frankfort, 55 Me. 46; Cairncross v. Pewaukee, 78 Wis. 66, 10 L. R. A. 473, 47 N. W. 13, commenting upon and explaining Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407. Conceding that the roller was an object calculated to frighten

horses of ordinary gentleness, yet, at the most, the liability of the municipality for negligently permitting such objects to remain within the limits of a highway, if it exists, must primarily be dependent upon the fact that they are unlawfully upon the highway.

The sole negligence complained of in the declaration was averred to consist in keeping the steam roller in question on Park street for the space of two days, so as to be a public nuisance and dangerous to travelers passing along said street with their carriages and horses. There was no allegation that the roller, in consequence of its being disabled, presented such a changed appearance that the danger of its frightening an animal was enhanced. Nor was there any averment that the negligence was committed in the use of the canvas covering, and no proof was offered on the trial tending to show that such a cover was not the means usually employed to protect steam rollers from the weather when they were lawfully on the street and for the time being not in use.

Where but one inference can reasonably be drawn from the evidence the question of negligence or no negligence is one of law for the court. Northern P. R. Co. v. Freeman, 174 U. S. 379, 384, 43 L. Ed. 1014, 1016, 19 Sup. Ct. Rep. 763; Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193. It is only where the evidence is such that reasonable men may fairly differ as to the deductions to be drawn therefrom, that the determination of the fact of negligence should be submitted to a jury. Warner v. Baltimore & O. R. Co., 168 U. S. 339, 348, 42 L. Ed. 491, 497, 18 Sup. Ct. Rep. 68. The question which here arises, then, is, Did the evidence justify the trial court in permitting the jury to determine whether or not in allowing the disabled roller to remain at the place referred to, under the circumstances stated, the District negligently and unlawfully obstructed the highway?

We shall assume that the period when the steam roller became unserviceable while in use on Park street was the forenoon of the day prior to the accident, as claimed by the plaintiff. The right, however, to use a steam roller upon a public street for the purpose of the repair of such street we think necessarily includes the right to retain the roller upon the street until a reasonable time after the necessity for the use of the machine has terminated, in the meantime exercising due care in the deposit of the machine when not in use, and giving due notice and warning to the public of the presence of such machine if travel upon the street is permitted. We can perceive no difference in principle between using and keeping a steam roller on the streets until the completion of a particular work, and the maintaining a lawful excavation, such as for the construction of a sewer or of an underground road, and the use of an engine, derrick, etc., in connection with the hoisting of earth from an excavation. The appliances used in connection with such excavations, even though calculated to frighten horses of ordinary gentleness not familiar with

such objects, undoubtedly may be retained at the place where needed until the necessity therefor has ceased; and the circumstance that such appliances become temporarily disabled cannot, in reason, be held to affect the right of the municipal authorities to keep such machinery on the works until, in the ordinary course of events and in the exercise of a reasonable discretion, it is found convenient either to there make the needed repairs or to remove the appliances elsewhere for that purpose. Now, the only inference warranted by the record is that when the steam roller in question got out of order it was being used upon the street, and the necessity for its further use continued to exist. Had the machine not broken down, or had needed repairs been made to it at the place where the roller was deposited, it might lawfully have been allowed to remain upon the street while its further use was required, and until it was reasonably convenient to remove it. Under such a state of facts as has been detailed there was nothing, either in the circumstance of the disabling of the machine or in the detention, warranting the inference that the right to leave the roller upon the street over a legal holiday did not exist, and that an illegal use of the highway had originated. It follows that the facts in evidence respecting the keeping of the roller on Park street during the period referred to did not justify the submission to the jury of the question whether the District was negligent in so keeping the machine, as it could not reasonably have been inferred that the employees of the District were negligent in failing to remove the machine before the occurrence of the accident.

As respects the notice owing to the plaintiff of the presence of the roller, we agree with the opinion of the supreme judicial court of Maine in Lane v. Lewiston, 91 Me. 292, 39 Atl. 999, that where a steam roller is allowed to remain upon a municipal highway it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view of the obstruction itself in time to avoid it without injury amounts to notice. In other words, as stated by the Maine court, "no one needs notice of what he already knows," and "knowledge of the danger is equivalent to prior notice." 91 Me. 296, 39 Atl. 1000. That the plaintiff had notice of the presence of the roller on Park street in ample time to have avoided it is undisputed. When he turned from Fourteenth street into Park street it was broad daylight, there was nothing to obstruct his view westward, and in fact he testified that the roller was in plain sight. He was not induced or directed by the agents of the District to proceed past the roller. He knew that such objects sometimes frightened horses, but from his acquaintance with the disposition of his horse he believed that he could control the animal and drive safely past the roller, and he voluntarily undertook to do so. Now, it seems clear—particularly as the danger was neither hidden nor concealed—that the District was under no obligation to restrain

the plaintiff from attempting to pass, either by closing Park street or by other means. The District was not bound to presume that it would be necessarily hazardous to attempt to drive past the roller, stationary and quiet as it was, and familiar as horses in a large city usually are to the sight and sounds of electric and cable cars and horseless motors. The District, at best, was only chargeable with notice that the roller was an object which might frighten some horses of ordinary gentleness, not that it would inevitably do so. It was bound to give sufficient warning to drivers of the presence of the roller in time to enable them to avoid passing it, if desired. The District, however, had a right to assume that a driver of mature age was familiar with the habits and disposition of his horse, and was possessed of the common knowledge respecting the tendency of steam rollers to occasionally frighten such animals. The roller being lawfully on the street, the District was not bound to guard against the consequences of a voluntary attempt to drive by this roller. Certainly, if a driver believed that it would not be the natural and proper consequence of such an attempt that his safety would be endangered, the District ought not to be charged with notice that the attempt would be dangerous either to life or to limb.

The foregoing observations sufficiently indicate the errors committed by the trial court in the instructions given to the jury and in the refusal to give requested instructions, to which exceptions were noted. It suffices to say in conclusion that the trial court erred in refusing to instruct the jury, as requested, that upon the whole evidence in the case their verdict should be for the District. As said by this court, speaking through Mr. Justice Blatchford, in Schofield v. Chicago, M. & St. P. R. Co., 114 U. S. 615, 618, 29 L. Ed. 224, 225, 5 Sup. Ct. Rep. 1125, 1127:

"It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall. 442, 20 L. Ed. 867; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780; Herbert v. Butler, 97 U. S. 319, 24 L. Ed. 958; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840; Randall v. Baltimore & O. R. Co., 109 U. S. 478, 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322; Anderson County Comrs. v. Beal, 113 U. S. 227, 28 L. Ed. 966, 5 Sup. Ct. Rep. 433; Baylis v. Travelers' Ins. Co., 113 U. S. 316, 28 L. Ed. 989, 5 Sup. Ct. Rep. 494."

The judgment of the Court of Appeals of the District of Columbia is reversed, with instructions to that court to reverse the judgment of the Supreme court of the District of Columbia, and to grant a new trial.

CITY OF NOBLESVILLE *v.* NOBLESVILLE GAS & IMPROVEMENT CO.

(*Supreme Court of Indiana, June 21, 1901.*)

[60 N. E. Rep. 1032.]

Power to Fix Price of Natural Gas.*—Under Acts 1887, p. 36, providing that trustees of towns shall have power to provide reasonable regulations for the safe supply, distribution, and consumption of natural gas, the board of trustees have no power to fix the rate which a company supplying the inhabitants of the town with gas shall charge its patrons.

Same—Effect of Accepting Ordinance Fixing Rates.—Where a gas company was supplying the inhabitants of a town with gas under a franchise not fixing the rate to be charged, and voluntarily accepted the provisions of a later ordinance prescribing rates, the legal authorization to charge the rates so fixed was a consideration for the acceptance, so that the company was bound thereby.

Same—Same—When Vested Rights under Former Franchise Are Expressly Reserved.—Where a gas company, which was supplying the inhabitants of a town with gas under a franchise not prescribing the rates to be charged, accepted the provisions of a later ordinance fixing rates for certain uses of gas, expressly reserving all vested rights under its former franchise, it was entitled to fix its own prices for all uses not specified in the later ordinance.

Same—Suit to Enjoin City from Fixing Rates—Necessary Averments.—In a suit by a gas company, having a right to charge reasonable rates, to enjoin the enforcement of an ordinance fixing the rates to be charged, the complaint was not bad for failure to allege that the rates charged were reasonable, since, in the absence of a contrary showing, it will be presumed that they were.

Vacating Judgment—Mistake—Surprise—Neglect of City Attorney.—Where the attorney for defendant city elected to stand on his demurrer to the complaint, and allowed judgment to go as on default, the fact that the attorney had not informed the council of the specific averments of the complaint, and that the attorney's action in allowing judgment to go on demurrer was unauthorized and unknown to the city, did not show that the judgment was taken through mistake, surprise, or excusable neglect, so as to entitle defendant to an order vacating the same.

Appeal from circuit court, Clinton county; James V. Kent, Judge.

Suit by Noblesville Gas & Improvement Company against the city of Noblesville. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. R. Fertig and R. K. Kane, for appellant.

Gavin & Davis, for appellee.

HADLEY, J. Suit by appellee for injunction against the enforcement by appellant of its ordinance purporting to regulate the price to be charged by appellee for natural gas in certain cases. The complaint is in two paragraphs, to

*See City of Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321; Zanesville *v.* Zanesville Gas Light Co., 47 Ohio St. 1; Lewisville Natural Gas Co. *v.* State of Indiana, 135 Ind. 49, 21 L. R. A. 734 (overruling Rushville *v.* Rushville Nat. Gas Co., *supra*); *Re* Pryor, 55 Kan. 724, 29 L. R. A. 398; State *v.* Laclede Gas Light Co., 102 Mo. 472; State *v.* Columbus Gas Light & Coke Co., 34 Ohio St. 572, 32 Am. Rep. 390.

which a general demurrer was overruled. The city elected to stand by its demurrer, and judgment was rendered against it as upon default, in accordance with the prayer of the complaint. Subsequently, but at the same term of court, the city filed its motion, supported by divers affidavits, to set aside the judgment, open the case, and allow it to file an answer, which motion was overruled. These two rulings present the only questions for decision. The complaint discloses that the town of Noblesville, in December, 1886, granted to appellee, a corporation, the right to lay and maintain its gas pipes and mains in the streets and alleys of the town for the purpose of supplying the town and its inhabitants with natural gas upon specified terms. There was no exclusive right, no time limit, fixed for the continuance of the license, no restrictions upon the prices that might be charged for gas, and no reservation by the town of any right to revoke or to interfere at a subsequent date with appellee's enjoyment of the franchise. Under this grant appellee dug gas wells and put in its plant at great expense. Subsequently the town was incorporated as a city, and on April 11, 1888, the common council passed an ordinance entitled "An ordinance authorizing corporations, firms and individuals, to lay and maintain pipes in the streets, alleys and public grounds of the city of Noblesville for the purpose of supplying said city and its inhabitants with natural gas for heating and illuminating purposes," prescribing in said ordinance a schedule of maximum rates that might be charged for gas in the instances therein specified by any one accepting its provisions. In the schedule prescribed, among other omissions, no rate was fixed, or attempted to be fixed, for furnaces and bath and water heaters in residences. The board of directors of the gas company, by resolution duly passed and filed with the common council of the city, accepted the provisions of the ordinance of 1888, upon the express "condition that none of the vested rights of the Noblesville Gas & Improvement Company under former franchises shall be in any manner affected thereby." The schedule of rates prescribed by the ordinance of 1888 was precisely the same rates fixed and charged by the gas company prior thereto, and the same rates are now being charged. For furnaces and bath and water heaters in residences the company has heretofore and is now charging, for furnaces from $28 to $38.50 per year, according to size of fire pot, running from 22 to 28 inches, and for bath and water heaters each $6 per annum. In January, 1900, the common council of the city pretended to pass another ordinance, termed by it as supplemental to, but not in repeal of, the ordinance of 1888, whereby it is attempted to prescribe another schedule of maximum rates chargeable by any corporation, firm, or person now or hereafter furnishing gas to the inhabitants of the city, among which rates are, for furnaces in residences, $2.10 per room per year, kitchen, pantry, halls (except reception halls), and unfinished attics

not to be counted, and no charge allowed for grates and other heaters in rooms of houses where furnaces are used; for bath and water heaters, $3.50 per annum. The last ordinance appellee refused to accept, and insists upon its right, under its grant of 1886, to make its charges as it deems proper in all instances not provided for in the ordinance of 1888. Occupants of houses where furnaces and grates and other heaters are used refuse to pay, and give out in speeches that they will not pay, anything for grates and other heaters, and only pay $2.10 per room per year, without reference to the amount of gas consumed; and many persons using bath and water heaters give it out in speeches that they are not required to pay, and will not pay, to exceed $3.50 per year for such heaters; and many others are giving it out that they are not required to pay according to the ordinance of 1888, but according to the ordinance of 1900; and much contention and confusion has arisen between appellee and its customers as to the amount properly chargeable for gas, and by reason thereof many actions have been brought and are now pending in the Hamilton circuit court wherein the plaintiff alleges that the appellee is asserting the right to collect rates in excess of what it is entitled to, and injunctions are prayed against appellee from collecting its just demands, and many other similar suits are threatened and will be brought if not restrained. There was no consideration for the acceptance of the ordinance of 1888, and appellee is not bound thereby. The ordinance of 1900 constitutes a cloud on the franchises and rights of the appellee, and is made the basis by consumers for their contentions that they are not bound by the rates prescribed by the ordinance of 1888, nor by the rates fixed by appellee in cases where the ordinance of 1888 does not prescribe them. To avoid a multiplicity of suits, and to put to rest the many controversies that have arisen between appellee and the consumers of its gas, it is necessary that the court determine their respective rights under the ordinances of 1888 and 1900. Prayer that the ordinance of 1900 be adjudged null, and that appellant be perpetually enjoined from attempting to enforce its provisions against appellee, and that the rights of the parties concerned, under the ordinance of 1888, be determined.

The real question presented by the demurrer is the validity of the ordinance of 1900, and the power of the city council to pass it is the only ground upon which it is controverted. Appellant impliedly concedes that to sustain its contention we must overrule the case of Lewisville Natural Gas Co. v. State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734, and reassert the doctrine discarded in City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321, and this we are earnestly urged to do. The city council attempted, by the ordinance of 1900, to accomplish but a single thing, namely, to arbitrarily regulate the prices chargeable by appellee to its consumers of gas. All are agreed that

the power to pass such an ordinance must be drawn from legislative grant, and that the grant has not been made unless it be found within the provisions of the act of 1887 (Acts 1887, p. 36), which reads thus: "That the board of trustees of towns and the common council of cities, in this state, shall have power to provide by ordinance, reasonable regulations for the safe supply, distribution, and consumption, of natural gas within the respective limits of such towns and cities, and to require persons or companies to whom the privilege of using the streets and alleys of such towns and cities is granted for the supply and distribution of such gas, to pay a reasonable license for such franchise and privilege." It is not doubted that the power contended for by the appellant resides in the lawmaking body of the state, and that it may be by such body conferred upon towns and cities. It is, however, no longer an open question that municipal corporations possess only such powers as are conferred upon them by the legislature, either in express terms or by necessary implication, and that when a fair and reasonable doubt exists as to the existence of power it will be resolved against the municipality, and the power denied. Rowland v. City of Greencastle (at last term) 58 N. E. 1031; Lewisville Natural Gas Co. v. State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734, and authorities cited.

It would be doing violence to the rules of statutory construction to hold that, under the law of 1887, the power of a city, when not reserved in granting a franchise, to prescribe the prices chargeable by its license to consumers of its gas, is free from fair and reasonable doubt. It is insisted that the word "safe" should be construed as qualifying the word "supply" only, and that the words "distribution and consumption" are unqualified, and that the power to make regulations for the distribution and consumption of gas implies the power to regulate in any reasonable way calculated to promote safety or health, or to protect the people against exorbitant charges. We must have reasons for such construction, and we find nothing in the structure of the statute itself, or in the circumstances and conditions existing at the time of its enactment, to warrant the belief that the lawmakers intended any such thing. In addition to the reasons advanced in the Lewisville Case, it may be added that the people, after four more years of experience in the production, conveyance, and use of natural gas, and the fuller knowledge of its dangerous nature, and the traffic in it as an article of commerce, and after having in 1889 (Acts 1889, p. 24, § 3) expressly conferred upon towns and cities the power to grant the right to lay pipes through streets and alleys for distribution of natural gas to consumers, through their representatives, in 1891, as a further precaution against danger from explosions, prescribed the minimum strength of transporting pipes (Acts 1891, p. 89); and, furthermore, at the same session, created the office of

natural gas supervisor, and imposed upon that officer the duty of making "personal inspection of all gas wells of the state," and of seeing "that every precaution is taken to secure the health and safety of workmen engaged in the opening of gas wells, and of laying mains and pipes, and of all those who in any manner use gas for mechanical, manufacturing or domestic purposes" (Acts 1891, p. 379, § 1); and at the same session, finding it then expedient to confer upon cities of 100,000 population the power contended for by appellant, were able to express their purpose in the clear, apt words following: "The common council shall have power * * * to license, tax, regulate, and prohibit, the supply, distribution, and consumption of artificial and natural gas, of water, and of electricity, and to fix the prices thereof." Id. p. 148. Since the discovery of natural gas, the protection of the people against the perils incident to its use has been conspicuously prominent in the legislation upon the subject, but after patient search we are unable to find any language in any act that fairly and reasonably imports a purpose of the legislature to interfere with its commercial value, or to confer upon towns and cities of less than 100,000 population the power to do so, and we must therefore hold that no such power exists. It follows that the ordinance of 1900 was ultra vires and void.

It is doubtful if we are called upon to decide anything with respect to the ordinance of 1888. But since it is alleged by appellee that its acceptance of the ordinance of 1888 was without consideration, and imposed upon it no obligation to abide the schedule of rates fixed by that ordinance, and the further averment that controversies have arisen between appellee and its consumers as to the force and effect of that ordinance, and a multiplicity of suits threatened, we think it proper to consider the general subject. The city had the unquestionable right to grant to any person, firm, or corporation a franchise to occupy its streets and alleys for conveyance of gas to consumers. But it was under no compulsion to convey such right to any one. The subject of grant rested in contract, like any other matter. As the price of the right, the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals. City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 116; Western Paving & Supply Co. v. Citizens' St. R. Co., 128 Ind. 531, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462. That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract; and the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent

of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain.

There is no merit in appellee's contention that the ordinance contract of 1888 fails for want of consideration. Appellee's original franchise of 1886 was without restriction as to rates, and it could have continued to enjoy its franchise and fix its own rates (if reasonable) if it had chosen to do so. By the ordinance of 1888, the city, in effect, proposed that any person, firm, or corporation, including appellee, desiring the use of its streets and alleys as a means of marketing natural gas, might have the same by undertaking to abide by and perform all the conditions set forth, including the limitation upon prices for gas. Appellee was not required to accept the new proposition. It might have gone on without a contract for chargeable rates, and taken its chances of legal interference, or it might free itself of uncertainty by accepting the certainty of contract. It chose the latter course, accepted the ordinance, and for the first time had a contract and a legal authorization to charge the price specified in the ordinance contract. This was a sufficient consideration. But in its acceptance of the ordinance of 1888 appellee expressly reserved all vested rights under its franchise of 1886. One of these rights was to fix its own prices, within reasonable limits, for gas, and must be held to apply to all instances and uses of gas not specified in the ordinance of 1888; that is to say, under the facts shown, for all service, instances, and classes specified in the 1888 ordinance appellee is not entitled to charge in excess of the rates fixed by that schedule, and for all service and uses of gas not specified in the ordinance of 1888 appellee is entitled to charge a reasonable price.

It is asserted by appellant that the complaint is bad, and exhibits no equity, for failure to aver that the prices charged by appellee for gas, not ruled by the ordinance of 1888, are reasonable. In the absence of any showing to the contrary, we must presume that they were reasonable.

Final judgment was entered on March 12, 1900, and on April 12, 1900, but at the same term, appellant filed its motion, supported by affidavits, to set aside the judgment, and for leave to file its answer. It is claimed that there was an abuse of discretion in the overruling of this motion. It appears that the complaint was filed January 6, 1900. On January 17th, appellant, after having been duly summoned to answer the complaint, filed its demurrer thereto. The venue was then changed to the Clinton circuit court. A day was fixed in the latter court for argument on the demurrer. The regular attorney for the city and the attorneys for the appellee went from Noblesville to Frankfort on the day fixed, and argued the demurrer, at the conclusion of which argument the court announced that he was inclined to overrule the demurrer, but would reserve his decision for further con-

sideration, and would advise the attorneys interested when he was ready to rule; whereupon the attorney for appellant announced that, if the decision was adverse to the defendant, it would stand by its demurrer, and appeal to the supreme court. When ready, the judge gave the attorneys four or five days' notice of the time when he would give a decision upon the demurrer, indicating therein what the decision would be, and in response to which notice appellant's said attorney wrote the court to the effect that, in view of its determination, it would be unnecessary for him to be present, and requested the court to note an exception, and show the granting of an appeal, which was done. This is an application to be relieved from a judgment, and, to authorize the relief, it is incumbent upon appellant to show that the judgment was taken against it through its mistake, inadvertence, surprise, or excusable neglect. Section 399, Burns' Rev. St. 1894 (section 396, Horner's Rev. St. 1897; section 396, Rev. St. 1881). There is no effort made to justify the vacation of the judgment further than to show that the city's attorney, intrusted with the defense, failed to inform the council of the specific averments of the complaint, and that it had no knowledge of such averments, and the attorney's act in allowing judgment to go on demurrer was unauthorized and unknown to the city. It is not shown that any of the city council ever inquired of their attorney about the averments of the complaint, or that the attorney was guilty of any fraud or deception. It is, however, shown that the motion to set aside was signed and presented by other attorneys, who were probably employed in the case after the rendition of the judgment. There is no doubt expressed or intimated but that the city attorney, in all that he did with respect to the case, acted in good faith and in accordance with his best judgment. That other lawyers may differ with him as to the propriety of filing an answer and making a defense affords no ground for opening the case, as the question must be determined by the trial judge from the facts entering into and surrounding the case at the time of the rendition of the judgment. There was abundant time for the consideration of all questions of law and fact presented by the complaint. Every one is bound to vindicate his rights in due season, and to know, at his peril, the soundness and extent of his defense. The law allows him to make as many separate defenses as he chooses, but requires him to present them when his rights are assailed in a judicial proceeding or be forever precluded. Center Tp. v. Board of Com'rs of Marion Co., 110 Ind. 579, 589, 10 N. E. 291; School Tp. v. Irwin, 150 Ind. 12, 17, 49 N. E. 806. The court did not abuse its discretion in overruling the motion. Judgment affirmed.

STATE *ex rel.* WISCONSIN TEL. CO. *v.* CITY OF SHEBOYGAN *et al.*

(*Supreme Court of Wisconsin, June 20, 1901.*)

[86 N. W. Rep. 657.]

Right of Telephone Company to Erect Poles in Streets*—Construction of Code Provision.—Under Rev. St. 1898, § 4971, providing that the word "highway" shall include any road laid out by a municipal corporation, a telephone company authorized to erect its poles on highways by section 1778 may erect such poles in city streets, subject only to reasonable police regulations.

Same—Consent of City.—The consent of a city, authorized by its charter to control its streets, to the erection of poles on the streets by a telephone company authorized by Rev. St. 1898, § 1778, to erect its poles on city streets, is not a franchise, within the meaning of section 940b, prohibiting the granting of municipal franchise, unless a petition specifying the franchise has been filed and published, and hence the permission cannot be denied for failure to so file and publish the application therefor.

Same—Application for Permission to Use Streets—When City Must Take Action Thereon.—Where a telephone company, authorized by Rev. St. 1898, § 1778, to erect its poles on a city street, requests a city, authorized by charter to control its streets, to be allowed to permit the erection of poles in certain streets, the city cannot refuse to take any action on the application on the ground that the streets are already incumbered with poles, and that a change to underground wires is contemplated, but the city must act by the adoption of some plan which will recognize the rights of the parties.

Same—City May Regulate Location of Poles.—A city authorized by charter to control its streets may enact an ordinance requiring the location of the poles and further occupation of its streets by a telephone company authorized by Rev. St. 1898, § 1778, to erect poles in city streets, to be approved by the municipal authorities.

Same—Company May Use Street Subject to Police Regulation—Police Regulations Proper and Improper.—A city authorized by charter to control its streets and regulate trade and commerce cannot require a telephone company authorized by Rev. St. 1898, § 1778, to erect its poles in city streets, to accept an ordinance allowing the city to regulate the charges and rates, and to purchase the property at the appraised value, and to allow the city to use a portion of the poles and to use the line free of charge in case the city constructs an exchange, and providing a forfeiture of the property to the city in case of a failure to operate lines, as conditions on which the municipality will grant permission to erect poles in the street, since such conditions are not proper police regulations.

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*Poles and wires in streets, see United States Illuminating Co. *v.* Grant, 55 Hun 222; Suburban Light & Power Co. *v.* Board of Aldermen of the City of Boston, 10 L. R. A. 497, and *note*; Michigan Telephone Co. *v.* City of Benton Harbor, 47 L. R. A. 104, and *note*; City of Marshfield *v.* Wisconsin Telephone Co., 44 L. R. A. 565, and *note*, 577; Attorney General *ex rel.* Board of Gas & Electric Light Com'rs *v.* Walworth Light & Power Co., 16 L. R. A. 398; Hodges, City Tax Collector, *v.* Western Union Tel. Co., 29 L. R. A. 770; State of Missouri *ex rel.* Laclede Gas Light Co. *v.* Murphy, Street Com'r, 130 Mo. 10, 31 L. R. A. 798, and *note*.

As to conflicting rights of telephone and street railway companies, see Cincinnati Inclined Plane R. Co. *v.* City & Suburban Telegraph Ass'n, 12 L. R. A. 534.

As to the right to transfer or mortgage the privilege to use streets for telegraph and telephone purposes, see Michigan Telephone Co. *v.* City of St. Joseph, 47 L. R. A. 87.

State *v.* City of Sheboygan

Appeal from circuit court, Sheboygan county; Michael Kirwan, Judge.

Mandamus by the state, on the relation of the Wisconsin Telephone Company, against the city of Sheboygan and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

The relator, the Wisconsin Telephone Company, presented to the circuit court of Sheboygan county its petition for an alternative writ of mandamus, setting out the following facts: The relator is a Wisconsin corporation, organized in 1882, conducting a telephone business and maintaining telephone lines and exchanges in this state. The defendant city of Sheboygan is a municipal corporation, and the other defendants mayor, clerk, and aldermen of said city. The petition sets out the charter provisions regarding control and regulation of the city streets, and that in 1893 the council adopted an ordinance providing that the location and erection of all poles, etc., should be subject to the approval of the city authorities, and that the occupation of all streets not already occupied should be upon a plan submitted and approved by the common council. In 1882 the relator established an exchange in the city of Sheboygan, which was a part of its state system, and connected with other exchanges east of the Mississippi and north of the Ohio rivers. The exchange was established without any grant of authority or permission from the city, but its poles were put up and wires strung with its knowledge and consent, and without objection, until 1893, when a competing line was built under an ordinance, a copy of which was attached. Since that time the city has insisted that relator had no right to place any additional poles upon any of its streets without permission, has refused to consent to the location of any poles, or to the extension of its system, has used force to prevent the same, and has seriously interfered with the making of necessary repairs. Since 1893 relator's exchange has not been, and is not now, in accord with the most approved plan of telephone construction, in particulars fully set out. There are many places in the city which cannot be supplied with telephones as the lines are now located, and cannot be reached without setting up additional poles. Relator has been and is now desirous of perfecting its system, extending its lines, and making the same according to the most approved plan of telephone construction. On September 11, 1899, the relator presented to the mayor and common council a petition stating its desires, and a willingness to conform to any and all reasonable requirements or changes thought necessary or desirable in its proposed plan. Attached to the petition was a map of the city showing the location of its poles, the changes proposed, and extensions contemplated. The city authorities were asked to approve the plan and grant permission for the proposed extensions and changes, and, if the plan was not approved, to suggest such

changes therein as were deemed for the best interests of the city. Such petition was referred to a special committee of the council. After a conference with the representatives of the company, the committee reported that the latter refused to accept a franchise on the same conditions granted to the Northwestern Telephone Company, which was the competing company before referred to, and recommending that action on the petition be temporarily postponed. Such report was adopted, and no further action on said petition has been taken. The petition herein further sets out that relator was willing to accept a franchise which conformed to the one mentioned except so much of the same as assumed to regulate the rate of telephone charges, and except as to the following requirements: A provision that, should the city desire to purchase the exchange at a price to be fixed by appraisers, it would convey its exchange to the city; the use of the top 30 inches of all poles for the police and fire-alarm or other electric system, free of charge; a condition that, in case the company failed to maintain and operate its exchange, its rights should be forfeited, and its property and poles therein used by the city should become the property of the city; and, lastly, in case the city should construct an exchange for the use of its officials, and not for private use, the city should have the right to connect its exchange with that of relator's, and have the same right to use its telephones in connection with relator's as are given to its patrons, free of charge. The refusal of the city to approve the plan presented prevents the relator from making the changes and extensions desired, and, unless the city be required to take action thereon, relator has no remedy in the premises. An alternative writ of mandamus was issued, to which the defendants made due return. After many additions and denials, the return sets out that the petition, map, and plan of relator before referred to was intended by relator to constitute, and would in law constitute, if approved by the city, a grant or franchise to use the streets and alleys named for its purposes, and that no application for such franchise had ever been published in the official paper of the city, as required by section 940b, Rev. St. 1898; that the action of the council on said petition was not based solely upon the refusal of relator to accept a franchise fixing rates, but was based upon the power, authority, and discretion of the common council to require and enact reasonable regulations and by-laws, such as were contained in the franchise granted to the other company, and embodying the conditions hereinbefore mentioned. The return also sets out that the streets of the city are now, and since 1896 have been, incumbered and obstructed to a great extent by the poles of the different telephone, telegraph, electric light, and electric street-railway companies, and by poles belonging to the city used for its fire-alarm system; and that a prudent exercise of the power vested by law in the council requires that a change

be made in the mode of running wires, and that they be required to run underground as soon as practicable. It also sets out that relator has not and cannot obtain the consent of lot owners to place poles in the streets, and has not the power of eminent domain, and that the granting of the petition would be vain and nugatory. Further, that the relator's exchange was erected without right; is defective and inadequate; a source of annoyance and a nuisance to the inhabitants; is being maintained to create a monopoly, and to compel the other company to either raise its rates, go out of business, or consolidate with relator, and to that end has refused to submit to any regulation fixing charges, and has offered its telephones free of charge. The field is limited as to patronage, and a franchise to relator without regulation as to charges would result in impairing the efficiency of service, or in the insolvency or consolidation of the companies. It was to prevent this disastrous condition of affairs, and because the council did not wish to legalize the present unlawful structures of relator in the streets, that the petition of relator was refused. The right to deny the petition as a matter of discretion was also claimed. By further allegations the defendants disclaim the right to control through or long-distance business of the company, but insist that local business may be continued under reasonable regulations. The return sets out an ordinance adopted in 1893 regulating the erection of poles and the stringing of wires for the transmission of electricity, being sections 183 to 216. Section 187 provides that the exact location of all poles shall be subject to the approval of the proper city authorities, and that the occupation of all streets not already occupied shall be upon a plan to be approved by the common council. A demurrer to the return on the ground that it did not state facts sufficient to constitute a defense to the issuance of the writ was overruled. In a lengthy written opinion, the trial judge bases his ruling largely upon non-compliance with section 940b. The relator appeals from the order overruling the demurrer.

Miller, Noyes & Miller, for appellant.
T. M. Bowler, City Atty., for respondents.

BARDEEN, J. (after stating the facts). The relator is a Wisconsin corporation organized for the purpose of establishing, maintaining, and operating a system of telephones in this state. It has such powers, and is subject to such restrictions and regulations, as are granted and prescribed by law. Its authority to use and occupy the streets and highways of the state is granted by section 1778, Rev. St. 1898, which came into existence in 1848. So far as is material to this litigation, such section reads as follows: "Any corporation formed under this chapter to build and operate telephones, or conduct the business of telegraphing, may construct and maintain any such lines with all necessary appurtenances, from point to point upon or along or across any public road, highway or

bridge or any stream or body of water, or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure; * * * but no such telegraph line or any appurtenance thereto shall at any time obstruct or incommode the public use of any road, highway, bridge, stream or body of water." The right of a telephone company to organize, to erect lines, and to do business under our laws, and especially under section 1778, was first challenged in the case of Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 32, 21 N. W. 828. That right was vindicated in an opinion by the present chief justice, and which has been cited with approval in many jurisdictions. Duke v. Telephone Co., 53 N. J. Law, 341, 21 Atl. 460; Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544; Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; Southern Bell Telephone & Telegraph Co. v. City of Richmond (C. C.) 78 Fed. 858. This court has sanctioned the doctrine stated in Roberts v. Telephone Co., 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; City of Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565; Krueger v. Same, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298. The exact nature and scope of the power thus conferred has at no time been definitely treated. In the City of Oshkosh Case this court held that a telephone company might lawfully organize under chapter 86, and construct and operate its lines under section 1778, and it was there said that the company was occupying the street "not only by express grant of the legislature, but by express permission of the city authorities." In the Roberts Case the contest was whether poles set by the company were unlawful structures in a highway. In disposing of this question Cole, C. J., remarks: "Was it lawful to place these poles in the highway? The statute authorizes any .corporation formed to build and operate telegraph lines or conduct the business of telegraphing to construct and maintain its lines, with all necessary appurtenances, along a public highway." Section 1778. And in Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 32, 21 N. W. 828, it was held that "the statute included telephone companies, although such companies were not specifically mentioned therein. The poles, then, were not unlawful structures in the highway, but were authorized by law to be set therein." In the City of Marshfield Case we said the section in question authorized the use of the highways of the state by poles and wires, provided they were set so as not to obstruct or incommode the public use thereof. In the Krueger Case we held the statute granted no power to use the street except as against the public. Under it the public were foreclosed of the right to object to the poles being in the street, but the lot owner might pursue his legal remedies. Several of these cases related to the right to place poles in city streets, and it

was assumed that the word "highway" was broad enough to and did cover the streets of a city. That proposition is now disputed by the defendants. We will not pursue their argument. Section 4971 is to the effect that in the construction of statutes the word "highway" may be construed to include any road laid out by the authority of any town, city, or village. In view of the course of decisions and the importance of the rights involved, we see no good reason for turning from the position tacitly assumed in the cases notified. We therefore hold that the word "highway," as used in section 1778, covers the streets and ways of a city, as well as rural highways. We find support in this conclusion in a recent case in the federal court, construing a somewhat similar statute of Minnesota. Abbott v. City of Duluth (C. C.) 104 Fed. 833. A still more recent and extended discussion of the same statute by the supreme court of that state may be found in Northwestern Tel. Exch. Co. v. City of Minneapolis, 86 N. W. 69, where the same conclusion is reached. The right to construct and maintain poles in city streets is as ample and positive as to build in the country highways, except that it may be subject to stricter police regulation, as will be more fully discussed in a subsequent portion of this opinion. Not one of the cases referred to can be justified except upon the theory that the statute in question grants to corporations of this kind a franchise,—a special privilege, which could not be legally exercised without legislative authority. Under it, great corporations have been organized, vast sums of money have been expended, thousands of miles of poles and wires have been erected, and the systems are being extended until the remotest hamlet in the state may communicate with the business centers with the utmost ease. So far as we are aware, this is the only statute from which the authority and power mentioned arises. It came from the ultimate source of power, the legislature, and passed directly to such organizations as come within its terms. The trial court reached a somewhat different conclusion. His reasoning runs thus: The right to use the streets is a franchise. No franchise can be enjoyed or held which is not derived from the state. The legislature may delegate to municipal corporations power to make by-laws and ordinances which shall have the force of legislative acts. The charter of the city of Sheboygan gives the common council authority to control its streets, to make ordinances for the government and good order of the city and for the benefit of trade and commerce.

In the City of Marshfield Case this court held that section 1778 did not deprive cities of their power of police control over the manner in which the work of such corporation shall be done, or of the power to regulate the location and use of poles and wires in the streets. The city, therefore, having the power to regulate, control, and to prevent the incumbering of certain of its streets in the exercise of a reasonable discre-

tion, when called upon to exercise these powers, or take action as requested by relator's petition, was granting a franchise. Section 940b, Rev. St. 1898, provides that no franchise shall be granted by any village board or common council until the application therefor, containing the substance of the privileges asked for, shall be filed with the village or city clerk, and be published in the official paper. The relator failed to comply with these requirements, and hence the return states a good defense. In reaching this conclusion the court failed to keep in mind the distinction between the rights or franchises granted by the state and the power of police control possessed by the city. As we have already seen, the power to exist as a corporation, and to exercise the franchise of the use of highways and streets, as against the public, was already possessed by the relator. The city had no power to add to or detract therefrom except in the exercise of its police power. The franchise existed by express legislative grant. Its exercise might be controlled only in recognition of its existence, and in conformity with a just and reasonable administration of the police power in the interest of the city and its inhabitants. In a sense, the city was called upon to grant a privilege. It had the power to regulate the use of its streets. It might deem it improper to allow poles to be set along some of the streets included in the proposed extensions. It might designate other streets, and thus exercise a reasonable discretion in the interests of its people. But such privilege was controllable only in harmony with the rights both possessed. In no proper sense was the privilege sought a franchise, within the meaning of section 940b. The consent of the city was only required or asked in view of its right to regulate. Having that power, it was its plain legal duty, when a plan had been submitted as its ordinance required, to take such action thereon as reason and a proper regard for the interests and legal rights of all concerned would seem to suggest. It was no answer for the city to say, as it did in general terms in its return, that the streets of the city were already incumbered by poles and wires, and that a due regard for the safety and convenience of its people rendered it prudent that a change be made "as soon as possible" in the manner of running wires used for electric purposes from poles to an underground system. If the time had arrived, and the exigencies were such, that such a change was necessary, it was its duty to act, and to adopt such plan as reason and enlightened judgment might suggest. In the first case in which this court was ever called upon to consider the reciprocal rights of the company and the city, a line was blazed with accuracy, and has since been followed in all the cases. The charter of Oshkosh contained a provision broader in terms than any contained in defendant's. It gave the common council authority "to regulate, control and prohibit the location, laying, use and management of telegraph, telephone and electric light

and power wires and poles." In disposing of the question raised, this court said: "But we do not think this was designed as giving to the municipality absolute authority to exclude such companies altogether from carrying on or operating their business within the corporate limits of the city, but simply to regulate the same, and to prohibit such location in improper places; otherwise the municipalities of the state would have the power to nullify what the legislature had expressly authorized. Undoubtedly, the common council, under the charter, had a right to regulate, in order to guard and secure the public safety and convenience; but their regulations, to be valid, should have been reasonable and fair, and not have gone to the extent of confiscation, nor of wholly excluding the plaintiff from the city." Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 32–40, 21 N. W. 828. The police power possessed by the city, as said in Chicago, M. & St. P. Ry. Co. v. City of Milwaukee, 97 Wis. 418, 72 N. W. 1118, extends to the protection of the lives, health, and property of citizens, and to the promotion of good order and good morals. It is not easy of exact definition, or possible to fix upon it exact limitations or restrictions. "It is easier to perceive and realize the existence of this power than to make its boundaries, or to prescribe limits to its exercise." Com. v. Alger, 7 Cush. 53. It arises under what has been termed "the law of overruling necessity." But it has its limitations. Certainly, its exercise must be reasonable, and calculated to promote the ends suggested. Hayes v. City of Appleton, 24 Wis. 544; Barling v. West, 29 Wis. 307, 9 Am. Rep. 576. Neither the city nor the state can destroy, or essentially modify, corporate franchises, except as the power is reserved in the original grant or by the constitution. They may regulate the mode of doing business with reference to the comfort, welfare, and safety of society, but cannot, under the pretense of regulating, take away any of the essential rights and privileges which the charter confers. In the exercise of its police power to control and regulate its streets, the city passed an ordinance providing that the location of poles should be subject to the approval of the proper authorities, and that the further occupation of its streets should be upon a plan to be approved by the council. This was reasonable, and the relator cannot and does not object to it. In the petition presented to the council it signified its readiness to conform to all reasonable requirements, and, if the plan presented did not meet with approval, it was ready to change the same to meet the wishes of the authorities. But the city seeks to go much further. It, in effect, says to relator that: "Before you can make any changes, or extend your system, you must consent to an ordinance fixing rates of charges to patrons. You must consent to sell your privileges at an appraised value in case the city shall desire to purchase. You must consent to the free use by the city of the top thirty inches of all poles for its police and

fire-alarm system. In case you shall fail to operate and maintain your exchange, any poles or property in any way used by the city shall become its property. And, finally, if the city shall construct and operate an exchange for the use of its officers and departments, it shall have the right to connect with your exchange, and have the rights, privileges, and service given other subscribers, free of all rental charges." These, in brief, are the conditions insisted upon by the city that shall be accepted by the relator, and are set up in the return as an excuse for not obeying the writ. The relator insists that the city has no power to impose any such conditions. None of them can be justified unless they can be said to fairly come within the purview of police regulations. The argument in behalf of the city is based entirely upon the power of the city to regulate and remove encroachments on its streets and to regulate trade and commerce. The fixing of maximum charges for use of telephones or service in the city is said to be a lawful police regulation to prevent extortion. That is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. Such power is inherent in the state, and is a necessary attribute of sovereignty. It does not pass to the minor division of government except by express grant, or by necessary implication from other powers granted. Every citizen holds his property subject to the proper exercise of this power either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it. 1 Dill. Mun. Corp. § 141. Speaking on the general proposition, the same learned author states the rule thus: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply connected, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Section 89. That rule has been substantially adopted and approved in this state. Hayes v. City of Appleton, 24 Wis. 542; Gilman v. City of Milwaukee, 61 Wis. 588, 21 N. W. 640; Bell v. City of Platteville, 71 Wis. 139, 36 N. W. 831; Kilvington v. City of Superior, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45; Becker v. City of La Crosse, 99 Wis. 414, 79 N. W. 84. Whatever power a municipality possesses over the wires and poles of a telephone company in its streets must be granted it by the legislature. Section 698. The charter of the city of Sheboygan empowers it to enact proper ordinances and regulations for the government and good order of the city, for the benefit

of trade and commerce, for the suppression of vice and the prevention of crime, to prevent the incumbering of streets, to provide for the removal of obstructions therein, to regulate the manner of using streets, and to protect them from injury. As we have already seen, this grant of power does not authorize the city to wholly prevent the relator from doing business within its limits. No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. Michigan Tel. Co. v. City of Benton Harbor (Mich.) 80 N. W. 387, 47 L. R. A. 1004. It has no authority to impose other conditions. That power rests in the legislature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail. City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. The case of City of Allegheny v. Millville, E. & S. St. Ry. Co., 159 Pa. 411, 28 Atl. 202, cited by defendants, has no application here. It was based upon the ground that under the constitution of Pennsylvania no street railway shall be constructed within the limits of a city without the consent of the local authorities. For that reason the imposition of a condition regulating rates of fare was justified. Neither does the power come to the city under the general authority to pass ordinances for the government and good order of the city and for the benefit of trade and commerce. To say that under this general power the city may fix rates for telephone service would be going entirely too far. The charter otherwise points out the cases in which the city may exact licenses and fix rates, and any attempt to extend the power would be running directly in the face of the rule laid down by this court in the City of Oshkosh Case. What has been said applies with almost equal force to the other conditions insisted on by the city. We do not see how, under the power it now possesses, the city can rightfully withhold action, or base affirmative action on the condition of financial benefits to itself. Such contention must rest largely upon the supposed exercise of power to grant or refuse the right to use the streets. This, of course, the city has no right to do except when the situation is brought within the rule stated in the City of Marshfield Case. We need not repeat what was there said relative to the right of the city to prohibit the erection of poles on certain of its streets. Such right must be exercised in the light of reason;

not with a view of prohibiting the company doing business in any given locality, but reasonably to protect the public against unnecessary obstructions, inconvenience, and dangers, for the general welfare and common protection of all. The right to purchase relator's exchange, if granted, would be a contract right of great value. So, also, as to the right to use the tops of the poles for the fire-alarm system, and the agreement as to forfeiture of property to the city in case of nonuse. Such rights have no relation to the legitimate exercise of the power of police regulation. To permit the city to base its action upon considerations of financial benefit to itself would be allowing it to put its powers up for sale to the highest bidder. Nothing could be more vicious. Very soon the interest of the public would be at the mercy of local boards. The company willing to yield the greater number of privileges or pay the most money would get the greatest favors. The embarrassments growing out of a recognition of the existence of this right are so manifest and so manifold that we need spend no time in discussing them. We say without hesitation that the city has no right to barter with the police powers, or exact for itself financial benefits as a condition for its exercise. Such power must be exercised for the public good and public welfare, and not for public gain.

The further contention that the city may refuse action on the ground that ruinous competition in telephone rates would result, cannot be sustained. The city has no express or implied power to legislate on this subject. Its power to regulate trade and commerce does not extend to controlling competition. Such power as it possesses must be exercised within the lines already suggested, and cannot be extended to cover municipal fears, or to control mere matters of local competition. The course followed by the relator is substantially that mapped out by this court in the City of Marshfield Case. It presented its petition with a plan of its proposed improvements and extensions. It signified its willingness to submit to such changes as were deemed for the best interest of the city. It then became the duty of the city to take affirmative action. What that action should be the court has no power to declare. It can only say, "Act, and let such action be in harmony with the powers granted in the charter as herein construed." Considering the return as a whole, we do not think it presents any question of fact for trial, or any legal justification for failing to obey the commands of the writ. The order appealed from is reversed, and the cause is remanded, with directions to sustain the demurrer to the return, and for further proceedings according to law.

STATE (PHILLIPSBURG ELECTRIC LIGHTING, HEATING & POWER CO., Prosecutor) *v.* INHABITANTS OF TOWN OF PHILLIPSBURG.

(*Supreme Court of New Jersey, June 10, 1901.*)

[49 Atl. Rep. 445.]

Electric Light Company—Repeal of Ordinance Granting Permission to Place Poles and Wires in Streets.*—A common council cannot repeal an ordinance granting permission to an electric light company to place its poles and stretch its wires on all the streets and alleys of the town when the company has conformed to the conditions of the ordinance so far as required, and has expended money in placing the poles and wires on certain of the streets, notwithstanding the common council may have been misled in passing the ordinance.

Same—Same—When the Officers and Stockholders Are Different Individuals from Those Who Received the Original Permission.—That the officers, managers, and stockholders of the company are different individuals from those who were stockholders when the permission was granted, gives no ground for the repeal of the ordinance.

Same—Repeal of Ordinance Not the Proper Remedy When Company Violates Its Charter.—If the corporation is violating its charter or the laws of the state, it is liable to a proceeding to forfeit its charter, but the ordinance of the common council, granting permission to erect poles and string wires, cannot for that reason be repealed.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the Phillipsburg Electric Lighting, Heating & Power Company, against the inhabitants of the town of Phillipsburg, to review an ordinance. Ordinance set aside.

Argued before VAN SYCKEL, GARRISON, and GARRETSON, JJ.

S. C. Smith, for prosecutor.

L. W. Schultz, for respondent.

GARRETSON, J. By an ordinance approved August 24, 1896, the common council of the town of Phillipsburg passed an ordinance permitting the prosecutor to place its poles and stretch its wires on each and every street and alley in the town, for the purpose of conducting electricity through the town. The ordinance prescribed the character of the poles, and the manner of stringing the wires, and the supervision under which they should be erected. It also required certain services to be performed by the company for the town, in consideration of the permission granted and provided for the filing of an acceptance of the ordinance. The acceptance of the ordinance was duly filed as required. In the spring of 1899, the company built more than a mile of pole and wire line in Phillipsburg, and there is evidence to show that this was done under the supervision of the committee on streets and alleys, as provided in the ordinance, and made contracts for over 800 lights for private consumers, and the first lights were

*See cross references to State *ex rel.* Wis. Tel. Co. *v.* City of Sheboygan, *ante*, p. 685.

used in April, 1899, and have continued to be used ever since. There is nothing to show that the prosecutor has in any way refused to perform for the town the services required by the ordinance. On the 15th of October, 1900, the common council passed another ordinance repealing the foregoing ordinance, and this writ is brought to test the legality of that municipal action.

We think that this question is settled by the cases of Hudson Telephone Co. v. City of Jersey City, 49 N. J. Law, 303, 8 Atl. 123, and Suburban Electric Light & Power Co. v. Inhabitants of East Orange Tp. (N. J. Ch.) 41 Atl. 865, which hold that permission granted by a common council, under like circumstances to this, was, after acceptance and expenditure of money under it, irrevocable.

The proceedings leading to the passage of the original ordinance cannot be reviewed by this writ, nor can we now look into the considerations which influenced the members of the common council to vote for it. It is an attack upon it in a collateral proceeding. Fraud or misrepresentation is not sufficient to avoid the act of a legislative body, even if proved. Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co., 20 N. J. Eq. 61–76.

That the stockholders, officers, and managers of the company are now persons different from those who were its stockholders, officers, and managers when the permission was granted could not afford a reason for the repeal of the ordinance granting permission. The permission was to the corporation, not to the individual members thereof. If the corporation is not complying with the terms of the permitting ordinance, obedience thereto should be enforced by appropriate proceedings. But, if the ordinance was repealed, it could be remade. The repeal of the ordinance would not accomplish such obedience, but would be the imposition of a penalty for failure to comply therewith, and no such penalty is anywhere authorized. If the corporation is engaged in acts not warranted by its charter, or in violation of the laws of the state, that is a matter in which the state is concerned, and a proceeding to forfeit its franchise would be the appropriate remedy. Light Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; Attorney General v. American Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971. This repealing ordinance must be set aside.

ROBERTS *et al. v.* CITY OF FARGO *et al.*

(Supreme Court of North Dakota, April 25, 1901.)

[86 N. W. Rep. 726.]

Ultra Vires Contract for Street Lighting*—Right of Taxpayer to Enjoin Disbursements Thereunder.—On August 6, 1895, in pursuance of a resolution adopted by the city council of the city of Fargo, certain officers of the city signed a written agreement, in which the city of Fargo was described as party of the second part, and the Fargo Gas & Electric Company, a private corporation, was described as party of the first part, and whereby the city agreed to pay said corporation, in consideration of certain electric light agreed to be furnished for lighting the city, the sum of $500 per month for the period of 10 years from and after August 19, 1895, at which date the contract, by its terms, took effect. Previous to signing said written agreement, no appropriation had ever been made or tax levied by the city council to meet the expenditures required to be made by the city in carrying out the agreement, or any part of such expenditures. *Held*, construing sections 2261–2264, Rev. Codes 1895, that said agreement was *ultra vires*, and void. *Held* that, inasmuch as said agreement involved the dissipation of public funds in large amounts, without authority of law, and in violation of law, an action will lie in behalf of a taxpayer to enjoin such unlawful disbursements.

Same—Construing Code Provision.—*Held*, that the provisions of section 2264, *supra*, are mandatory and prohibitive, and that no contract requiring a disbursement of city funds can be made by the city council, and no expense can be incurred by any city officer or officers, unless a previous appropriation has been made covering the expense involved in the same.

Same—All Persons Affected with Notice of Power of Municipal Officers and Its Extent.—*Held*, further, that all persons entering into contractual relations with public corporations or their officers are chargeable with notice of their powers and the limitations upon their powers.

(Syllabus by the Court.)

Appeal from district court, Cass county; Charles A. Pollock, Judge.

Action by Lee A. Roberts and others against the city of Fargo and others to enjoin defendant from disbursing its funds in payment of street lighting under an alleged ultra vires contract. From a judgment dismissing the bill, plaintiffs appeal. Reversed.

Ball, Watson & Maclay, for appellants.

Newman, Spalding & Stambaugh, for respondents.

WALLIN, C. J. The record in this action discloses the following facts: The plaintiffs, who are freeholders and taxpayers residing in the city of Fargo, bring this action to annul a certain contract in writing made on August 6, 1895, between said city of Fargo and the defendant the Fargo Gas & Electric Company, whereby the latter agreed to furnish electric light for lighting said city for a period of 10 years upon certain

*See generally, upon the subject of *ultra vires* contracts by municipal corporations, Huron Waterworks Co. *v.* City of Huron, 30 L. R. A. 848; State of Minnesota *ex rel. v.* Minnesota Transfer Railway Co., 50 L. R. A. 656; City of Fergus Falls *v.* Fergus Falls Hotel Co., 50 L. R. A. 170; Mayor, etc., of Nashville *v.* Sutherland, 19 L. R. A. 619, and *note*; Penley *v.* City of Auburn, 21 L. R. A. 657.

terms set out in said contract. The city of Fargo at all times in question was, and still is, a municipal corporation organized under chapter 28 of the Political Code. See Rev. Codes 1895, §§ 2108–2343. The mayor, treasurer, and auditor of said city are also made parties defendant. The Fargo Gas & Electric Company is a private corporation, formed for the purpose of manufacturing and selling gas and electricity, and having its principal office in said city of Fargo. The complaint sets out the contract in question as follows: "This contract, made and entered into pursuant to resolution of the city council of the city of Fargo adopted May 5, 1895, this 6th day of August, 1895, by and between the Fargo Gas & Electric Company, a corporation organized and doing business under the laws of the state of North Dakota, party of the first part, and the city of Fargo, party of the second part, witnesseth: The party of the first part, for and in consideration of the sum of five hundred dollars ($500) per month, to be paid monthly by the party of the second part, agrees to furnish to the party of the second part for the term of ten years from and after the 19th day of August, 1895, with fifty arc electric lights of 2,000 candle power each, to be kept burning each and every night during said term of ten years from dark until daylight: provided, that a pro rata reduction shall be made in any month for the number of hours any light or lights shall fail from accident or any other unavoidable cause to be kept burning as herein stated; such failures not to work a forfeiture of this contract. But if the party of the first part shall refuse upon reasonable notice to keep said lights burning as previously agreed for a longer term than is reasonably necessary to make any necessary repairs for that purpose and to put said lights in order, then said party of the second part may, at its option, cancel this contract. Said party of the first part shall suspend such of said lights as are not now in use under its present contract with said second party at such points upon the public streets of said city within a reasonable radius as shall be directed by said second party as soon as practicable, and, in case said lights are not so suspended on or before the 19th day of August, then the pro rata reduction hereinbefore provided for shall be made for all such lights as shall not then be ready for use until the same are in actual use. Said lights shall be suspended in the same manner as those now in use, and on Broadway and Front S. shall be placed not less than twenty-five, and on all other streets not less than thirty-five, feet above the surface of the street. Said party of the first part further agrees to furnish to said party of the second part such lights as it may order in excess of said fifty lights at the rate of $120.00 per year in addition to said $500.00 per month agreed to be paid for said fifty lights. Said party of the second part agrees during the term of this contract to take and use not less than said fifty lights, and in each and every year to appropriate and levy a sufficient sum to meet the require-

ments of this contract, and to pay the price herein agreed on for all lights used hereunder each month at the monthly meeting of the city council. It is further agreed that, in case of removal of any light or lights from one place to another after the same shall have been located and suspended, said city shall pay the actual and necessary expense for such removal to the party of the first part. It is further agreed that the party of the first part shall furnish to the party of the second part at the waterworks and city buildings of the party of the second part twenty-five 16 candle power incandescent lights, twelve of which shall be all-night lights; all to be located as directed by the party of the second part; said lights to be furnished for the full period of said ten years,—in consideration of which the party of the first part may use such water from the system of waterworks of the second party as it may need for the operation of its plant during all said terms, but without expense to the said party of the second part for pipes, connections, or anything except the water only. It is further agreed that the party of the second part shall have the right at all times to test any and all of said lights by a competent electrician, and if said lights, or any of them, shall be found to be less than 2,000 candle power, then the amount to be paid for such light or lights for the month in which said test is made shall be the proportion of the price above specified as the quantity of light furnished by such light or lights shall be of 2,000 candle power. Such test, however, shall be made while the lights tested are burning, and shall continue for not less than one hour consecutively, and the average candle during such time shall be the basis of determination. In witness whereof said parties have caused these presents to be executed, with the seal of said corporation, on the day and year first above written." This contract was recorded in the proper record book by the city auditor, and ever since it was entered into the same has been acted upon as a valid obligation by the parties thereto. It appears that the city council of said city, at its regular session held in the month of September, 1895, duly adopted an ordinance wherein the sum of $6,500 was appropriated for the purpose of lighting the city under said contract for the fiscal year ending August 31, 1896; and said city council, at its regular session held in September in the year 1896, by ordinance appropriated the sum of $6,000 for the purpose of lighting the city under said contract for the fiscal year ending August 31, 1897. Similar appropriations were made by ordinance for lighting the city under said contract in the month of September of each of the following years, viz.: In 1897, $7,000; in 1898, $7,000; in 1899, $8,000; in 1900, $8,000. The last-mentioned appropriation—that for 1900—was, however, made after this action commenced, and on July 20, 1900. At the trial it was stipulated that by an ordinance of the city council approved September 18, 1894, an appropriation of $6,000 was made out of the general fund

"for lighting the city under contract with the Fargo Gas & Electric Company" during the fiscal year commencing September 1, 1894. It is alleged and conceded that the Fargo Gas & Electric Company, for a long period of time prior to the date of entering into the contract in question, viz. prior to August 6, 1895, had been engaged in furnishing electric light for lighting the streets of the city of Fargo, and that said electric light had been so furnished to the city under a contract with the city, which contract, by its own terms, expired on the 19th day of August, 1895. At the trial, evidence was offered tending to show that at the date when the contract in question was entered into there was, as appeared by the books of the city, an unexpended balance in the city treasury of between two and three hundred dollars, which balance the evidence tended to show had been transferred by the city auditor from the lighting fund to the general fund of the city. The evidence did not show that said balance was available, or could be drawn upon, to pay for lighting the city, but the fact seems to be conceded that the appropriation made for lighting the city on September 18, 1894, had not all been expended for that purpose prior to August 6, 1895, but that, on the contrary, a balance out of said appropriation of between two and three hundred dollars had not been expended for lighting the city, but the same had been diverted and transferred to the general fund by the city auditor. With the exception of such small balance, however, the entire appropriation for lighting the city which was made in the preceding month of September had, prior to August 6, 1895, been paid out under a contract for lighting the city made with said Fargo Gas & Electric Company. Against objection, testimony was introduced at the trial tending to show that the Fargo Gas & Electric Company, in reliance upon said contract, and in executing the same on its part, expended about $2,000 in and about the erection of new poles and wires to be used in furnishing the light it had undertaken to furnish by the terms of the contract in question. There are no facts which are at all material to a decision of the case which are controverted.

Counsel for the plaintiffs assails the contract made on August 6, 1895, upon the sole ground that the same, as counsel contends, is ultra vires, and void, for the reason that the same was entered into in direct violation of certain restrictive provisions contained in the organic law of the city, which provisions are embraced in sections 2261–2264 of the Revised Codes of 1895. Said last-mentioned section is as follows: "No contract shall be made by the city council and no expense shall be incurred by any officers or departments of the corporation, whether the object of the expenditures shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The following extract, which we have quoted from the brief of counsel for

the plaintiffs, fully and fairly states the plaintiffs' principal contention in the case: "By the terms of the contract, respondent Gas & Electric Company agreed to furnish certain electric lights, for the compensation specified in the contract, during the term of ten years beginning August 19, 1895. No appropriation concerning the expenditure to be incurred under this contract was previously made by the city council. Not only was no such appropriation made to cover the expenditure of the full ten years, but none was made to cover the expense of the first year previous to the making of the contract." To fully understand the question presented, it will be necessary to refer to certain other sections of the city charter. Section 2140 provides that "the council shall hold its regular meetings on the first Monday of each and every month." Section 2261 provides that the "fiscal year" of all cities organized under this law shall commence on the first day of September of each year. Section 2262 reads as follows: "The city council shall at its regular meeting in September of each year or within ten days thereafter pass an ordinance, to be termed the 'annual appropriation bill,' in which it may appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and such ordinance shall specify the purposes for which such appropriations are made and the amount appropriated for each purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city either by a petition signed by them or at a general or special election duly called for that purpose." By section 2190 the annual city tax levy is required to be made in the month of September of each year, and this section specifically declares that such levy shall be "based upon the annual appropriation bill for the year," which appropriation, as already shown, is required to be made at the first regular meeting in September in each fiscal year, or within 10 days thereafter. Section 2262, supra. The several sections of the city charter to which we have referred, in our opinion, leave no room for doubt as to the purpose of their enactment. By their very explicit terms the city council is required at the beginning of each fiscal year—First, to "appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, specifying the purposes for which such appropriations are made and the amount appropriated for each purpose"; and, secondly, the council is required to levy a tax based upon the said annual appropriation. All further appropriations out of city funds in the same year are strictly inhibited unless made upon the express sanction of the voters, obtained in the manner pointed out in section 2262, or unless, in exceptional cases, as provided in section 2263. In the case at bar there is no claim

that the voters of the city have in any manner sanctioned or acted upon any appropriation involved in this case; nor is there a claim that the contract in question is an exceptional one, or that the same is authorized by any express provision of law. The statutes under discussion, and particularly sections 2262 and 2264, are severely restrictive in their nature, and they were obviously intended to operate as safeguards against the hasty and improvident expenditures of public funds by city officials,—a practice which, in some localities, has, as a matter of common knowledge, become an abuse and scandal. Similar statutes are found in many of the states. In Pryor v. City of Kansas City (Mo.) 54 S. W. 499, the court, referring to a like statute, used the following language: "Similar provisions are contained in charters of many other cities in other states. Dill. Mun. Corp. § 130, speaking of the reason underlying these provisions, says: 'Such limitations have been found by experience to be necessary to prevent extravagance, are remedial in their nature, are based upon the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought.' It is a matter of history, not only in our own state, but in most of the states, that before the adoption of these safeguards the credit of our cities was greatly impaired by outstanding liabilities, created by reckless disregard of ability to discharge obligations extravagantly or injudiciously incurred. These provisions of city charters are in harmony with the policy of the state. * * * They were all intended to put the state, the counties, and the cities upon a cash basis." In Blair v. City of Lantry (Neb.) 31 N. W. 790, the court, in construing statutes identical in meaning and very similar in language to those under consideration, annulled a contract for the purchase of a tract of land to be used for cemetery purposes, upon the ground that no previous appropriation had been made to cover any such expenditure. The language of the court in deciding the case, which is quoted below, is, in our judgment, entirely pertinent to the questions presented in the case at bar. The court said: "It will be seen that no contract can be made by the city council, or any committee or member thereof, or any expense incurred by any of the officers or departments of the corporation, whether such expense shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except in certain cases where a further expenditure is sanctioned by a majority vote of the legal voters of the city, etc. The testimony clearly shows that the appropriation ordinance in the year 1884 did not include the amount required for the purchase of the lands in question, and the case is not within any of the exceptions named in the statute. Hence the contract was directly prohibited. The city council, no doubt, in entering into negotiations for the purchase of the land in controversy, as also the

defendants in this case, acted in the utmost good faith, and there is not a particle of proof tending to show fraud or collusion, or an intention to disregard the law." The same court, in Gutta-Percha & Rubber Co. v. Village of Ogalla (Neb.) 59 N. W. 513, uses the following language: "If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed ultra vires, and can be ratified only upon the conditions essential to a valid agreement in the first instance." In this case the village, without having first made an appropriation to pay for the same, purchased certain apparatus for the use of its fire department. The property so purchased was delivered to and received by the village authorities, and the same was thereafter kept and used by them. The trial court and the supreme court held that the contract of purchase was void, for the reason that no previous appropriation had been made to cover the expense of the same. The statute upon which the court rested its decision in this case is, in our judgment, practically identical in its language, and wholly identical in effect, with section 2264 of the Revised Codes of 1895. The Nebraska statute (section 89, c. 14, Comp. St.) reads as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made covering such expense, except as herein otherwise expressly provided." In the same opinion the following language is used: "It is plain that the statute under consideration is mandatory, and an express limitation upon the powers of cities and villages of the class to which it applies. Indeed, stronger language could not have been used, and its meaning is too apparent for construction. It is the recognized doctrine that whoever contracts with a municipality must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitations imposed thereby." We think this case is squarely in point, and we regard the language of the opinion as apposite and instructive with reference to the case at bar. Wisconsin has a similar statute, although differing in its phraseology in some respects from that in this state. In City of Superior v. Norton, 12 C. C. A. 469, 63 Fed. 357, the circuit court of appeals has placed a construction upon the statute which harmonizes with the views of the supreme court of Nebraska in the cases above cited. In the course of its opinion the federal court said: "The people of the state, and their representatives in the legislature, sought thus to avoid reckless extravagance and the repudiation of just obligations. We find, therefore, throughout this act, the manifest design that there shall be prior provision for the pay-

ment of every obligation incurred, and restricted measures to insure such provision." Some of the facts in the Wisconsin case are dissimilar to those in the case under discussion, but the rule of construction laid down by the court, we think, is entirely in point, and the principle of the decision should govern in this case. In the case of Kiichli v. City of Minneapolis (Minn.) 59 N. W. 1088, the plaintiff, a taxpayer, brought an action to enjoin the city from paying for certain apparatus and electric lighting service furnished the city by the Brush Electric Light Company under a contract made with officers of the city, which contract was assumed to be valid, and had, before the action was brought, been acted upon for some time by both parties as a binding contract. The court had occasion, in deciding the case, to place a construction upon the following provision of the city charter: "But neither said city council nor any officer or officers of said city shall otherwise, without special authority of law, have authority to issue any bonds, or create any debt, or any liabilities against said city in excess of the amount of revenue actually levied and applicable to the payment of such liabilities." Referring to this provision, the court said: "It clearly prohibits the anticipation of any future revenue except that for which the tax is actually levied at the time the liability is incurred. It is unnecessary to notice step by step the limitations to be found in those sections. They constitute a system of checks and limitations on the creation of debt and the incurring of liability which wind up by depriving the city council of the power, without special authority of law, to create any debt or other liabilities against said city in excess of the amount of revenue actually levied and applicable to the payment of such liabilities." We regard this case also as being in point in support of the plaintiffs' contention. The language of the Minnesota statute differs slightly from that found in section 2264 of the Revised Codes of North Dakota, but the two enactments are clearly the same in their general scope and purpose, and the intent of both is to place mandatory restrictions upon the action of cities and their officers, prohibiting them from contracting either debts, liabilities, or expenses until provision shall have first been made to meet and discharge such debts, liabilities, or expenses. The court ruled in this case that the city could be enjoined from making further payments under the contract involved. The following authorities are also in point: City of Erie v. Land (Pa.) 35 Atl. 136; Jutte v. City of Altoona, 36 C. C. A. 84, 94 Fed. 61; Bladen v. City of Philadelphia, 60 Pa. 464; City of Indianapolis v. Wann (Ind. Sup.) 42 N. E. 901; Putnam v. City of Grand Rapids (Mich.) 25 N. W. 330; Webster v. City of Kansas City, 18 Mo. App. 217; Tennant v. Crocker (Mich.) 48 N. W. 577; City of Kearney v. Downing (Neb.) 81 N. W. 509; Wiegel v. Pulaski Co. (Ark.) 32 S. W. 116; Mineralized Rubber Co. v. City of Cleburne (Tex. Civ. App.) 56 S. W. 220.

Respondents' counsel have called attention to City of North Platte v. North Platte Waterworks Co. (Neb.) 76 N. W. 906, citing McElhinney v. City of Superior (Neb.) 49 N. W. 705. An examination of those cases will clearly show that nothing whatever in the same militates against the construction placed upon the Nebraska statute in the other Nebraska cases above cited. Said last-mentioned cases are not in point as sustaining respondents' contention. But we deem it unnecessary to further support the ruling announced in the cases cited. It will suffice to state that, except certain Illinois cases, hereafter to be cited, we have failed to discover a single adjudicated case based upon a statute the same or similar to that under consideration which announces a contrary rule; while, on the other hand, many cases supporting the rule have not been cited in this opinion. In this state the point involved, and upon which, in our judgment, the case must turn, viz. the proper construction to be placed upon the provisions of section 2264 of the Revised Codes and cognate sections, has been passed upon and settled by this court in the recently decided case in Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292. That case is, in our opinion, in all of its essential features, analogous to the case at bar, and the same sections of the statute which we are discussing in this case received a careful consideration and construction at the hands of this court in deciding the case from Grand Forks. In that case taxpayers of the city of Grand Forks were seeking to enjoin the officers of the city from carrying out contracts made with the city for the construction and equipment of an electric light plant, and to prevent the city from issuing warrants in payment for the same. In that case, as in this, the contract was regarded by all parties thereto as legal and binding; and the several contracts involved there, as here, were in part performed by the parties thereto prior to the institution of the action. The principal question there involved was whether, under the circumstances shown to exist by the record, the contracts to build and equip the plant created valid obligations of the city. In its opinion this court stated the contention as follows: "The contention is that the city, in attempting to exercise this power, has wholly failed to conform to plain charter requirements which are made prerequisites to its exercise, and without which the said contracts could not be lawfully entered into, or the plant be lawfully paid for, out of the general fund of the city or at all." In that case, as in this, there had not been, prior to making the contracts, any appropriation made or tax levied by the city council to meet the expense involved in carrying out the contracts. In deciding the case, the court placed a construction upon the language of sections 2190, 2262, and 2264 of the Codes. Referring to these sections, the following language was employed: "In our opinion, the objections to these contracts as binding obligations are radical and insurmountable. They were entered

into at a time and under circumstances which are fatal to their validity. The contracts were without authority of law, for the reason that no such improvement as that comprehended in the erection of a brick building and its equipment with the machinery mentioned was ever authorized or provided for either by an annual appropriation bill for said city for 1897 or by the tax levy of 1897 for the then current fiscal year." In the same case the court said: "The city was without power either to contract for, build, or operate the improvement in question. Section 2264. In short, all of its contracts and disbursements in connection with the plant were contrary to the statute, ultra vires, and therefore void; and hence all further proceedings and disbursements under the contracts should have been enjoined by the trial court." It therefore appears that in the Grand Forks Case this court, in adjudging that the contracts there involved were ultra vires, and wholly void, placed its ruling upon the simple fact that the contracts were entered into prematurely, and before an appropriation or a tax levy had been made by the council to meet the expense incurred in carrying out said contracts. We expressly justified the decision by a reference to the sections of the city charter which we have already cited.

We have no hesitation in ruling that the record in the case at bar brings this case squarely within the construction of the statute established in the case last cited. The contract in question was entered into on the 6th day of August, 1895, which date occurs in the last month of the fiscal year, which began on the 1st day of the preceding month of September. There is no claim made that at the regular session of the council which occurred in September, 1894, or at any time prior to or on August 6, 1895, the date of the contract, the council, by ordinance, resolution, or otherwise, made, or attempted to make, either an appropriation or a tax levy to meet the expense necessarily incurred in carrying out the particular contract in question, either for a period of ten years, or for one year, or for any period whatsoever. On the contrary, it is undisputed that the council at no time prior to entering into the contract in question took action with reference to an appropriation of city funds, or with reference to levying a tax to meet the expense or liability incurred or to be incurred under the contract. As we have already said, in effect, we are compelled to hold that these omissions of duty by the city council are fatal to the validity of this contract. Nor does this ruling, in our judgment, involve any injustice either to the Fargo Gas & Electric Company or the city, inasmuch as it is elementary that any person or corporation entering into contractual relations with public corporations or their officers are chargeable with notice of all provisions of the charter of such corporations relating to the subject-matter of their contracts, and are, therefore, presumed to have acted with full knowledge of such charter provisions.

It is contended that on August 6, 1895, the date of this contract, there was in the city treasury a balance of between two and three hundred dollars belonging to the lighting fund, which had been appropriated for lighting the city at the annual meeting of the council held in September, 1894, which appropriation was, however, in terms required to be paid out under a contract made with said gas and electric company. The existence of any such unexpended balance is controverted, but, from our standpoint, it is wholly immaterial whether such balance was or was not in the treasury when the contract in suit was entered into. If in the treasury, it was a balance left over out of an appropriation of $6,000 made nearly one year prior to entering into the contract in question, and made at a time when the city was being furnished electric light under a contract with said Gas & Electric Company, which, by its terms, expired on August 19, 1895, upon which date the contract of August 6, 1895, took effect. Under these circumstances it is too clear for discussion that the appropriation of $6,000, made in September, 1894, was made to meet a liability for lighting the city which was then existing. Besides, under the terms of the statute, such appropriation only could be expended for an expense incurred during the fiscal year in which the appropriation was made, viz. in the fiscal year ending September 1, 1895. It is, therefore, apparent that no admissible version of the facts of this case will warrant this court in holding that the alleged unexpended balance in the treasury was available to meet a demand which, by its terms, did not mature in whole or in part until the next ensuing fiscal year, and which demand arose under a contract not made until nearly one year after the money was appropriated. Besides, as has been seen, the contract in question, by its own terms, looked forward to future appropriations and tax levies as being the source out of which the money required under the contract was to be provided by the city of Fargo. To this may be added the fact that at the meeting of the council occurring in September, 1895, a sum was appropriated sufficient in amount to meet all the obligations accruing under the contract in the then current fiscal year. Hence it conclusively appears that no appropriation was made, either at or prior to the date of the contract in question, or during that fiscal year, to meet the expense, or any part of the expense, arising under the contract of August 6, 1895. In point of fact, about two weeks elapsed after the contract took effect, August 19, 1895, before any attempt was made to appropriate funds with which to meet the expense to be incurred thereunder, or any part thereof.

Counsel for respondents, in their brief, submit the following propositions, which embody respondents' chief contention: "The section (2264) does not pretend to make all contracts of the city void unless an appropriation is made prior to or at

the time of their execution. It is only where an expense is incurred under the contract for which no appropriation has been made." Counsel further say: "Our contention is that, if an appropriation is made by the city before expense is actually incurred, either under a contract or otherwise, the statute is satisfied." To this counsel adds the following by way of explanation: "It would seem axiomatic and elementary that no expense could arise or be incurred until there was something due,—some money due and payable from the city,—or at least until the obligation had matured, and such matured obligation to pay money is in itself a debt." This court has carefully read and considered the language of section 2264 in connection with the other sections of the city charter governing the revenues and expenditures of cities organized under chapter 28 of the Political Code, and has reached the conclusion that the construction of section 2264, as contended for by counsel, is inadmissible, and would violate not only the plain language of the statute, but its equally plain purpose. In our opinion, the practical effect of such construction would be to pervert the obvious design of the lawmaker, and to introduce into the administration of cities in this state the very mischiefs which the statutes and all similar statutes were intended to prevent. The construction contended for manifestly excludes from the inhibitions of section 2264 all contracts made, and all expense incurred, either by the city council or officers of the city under which the funds of the city are not to be disbursed until the next or some succeeding year, after the obligation is created. In other words, the sweeping prohibitive language used in said section has, as counsel contends, no application whatever to contracts made and debts incurred by the city in any case where pay day is postponed until some date in a succeeding fiscal year. This court cannot yield its assent to a construction of the statute, which, in its effect would in the judgment of this court, not only emasculate the language, and destroy the effect of the enactment, but would have the further effect to create a new law, under which the very abuses sought to be cut off by the legislature would be ushered in under the wing of judicial legislation. But counsel contends that no indebtedness was created by the contract of August 6th by its mere execution, and not until the city had been actually furnished light under the contract for the period of one month, and that all disbursements for the light so furnished could, under the terms of the contract, be provided for by the annual levies and appropriations before the same became due and payable, and that this arrangement as to disbursements fully satisfied the terms of the statute. In support of this contention counsel have cited a line of cases among which is the recent and leading case of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. We are of the opinion that the Walla Walla Case is not an authority in point. There the

plaintiff was granted an injunction restraining the city from proceeding to erect and pay for a system of water supply for the city to be owned and operated by the city. Prior to the commencement of the action, the city, under express charter provisions permitting it to do so, had entered into a contract with the plaintiff covering a period of 25 years, under which the plaintiff had erected a water system for the supply of the city, and had been supplying the city and its inhabitants with water for several years. The court held that, under the circumstances surrounding that case, it would result in an impairment of the obligations of the contract made with the plaintiff if the city should proceed to build and operate a plant of its own, and accordingly the city was enjoined from doing so. The further point was made that in its said contract with plaintiff the city had entered into an indebtedness which exceeded the limit of debt permitted to be incurred by the city charter, and that the contract was, for that reason, ultra vires and void. But the contract with plaintiff bound the city to pay plaintiff only by installments, and not until a specified service had been rendered the city under the contract. Construing this contract, the court held that the aggregate amount to be disbursed under it was not, within the meaning of the debt-limit statute, a true measure of the debt; that under such statute no part of the whole indebtedness would be considered, except such part as had matured, and become a present debt of the city, actually due and payable. In making this ruling the court was considering only the one matter of the debt limit. No such inhibitive statutes as those existing in this state were to be construed in the Walla Walla Case. Therefore we have no hesitation in declaring that the language used by the court in that case cannot be wrenched from its setting and made to subserve the purposes of the respondents in the case at bar. In this case there is neither allegation, proof, nor contention that the contract of August 6th exceeded the debt limit of the city of Fargo. The contract is assailed on no such ground.

But counsel for respondents have cited certain cases from Illinois where a statute like that in this state has been construed, and we shall concede that the same are in point as supporting their contention. See Carlyle Light & Water Co. v. City of Carlyle, 31 Ill. App. 325. This case was affirmed, but without discussion, by the supreme court of the state. See City of Carlyle v. Carlyle Water, Light & Power Co., 140 Ill. 445, 29 N. E. 556. We shall not attempt any analysis of the Illinois adjudications, nor shall we comment upon the same further than to say—and this with all respect for the courts which made the decisions—that, in our judgment, the effect of them is to defeat the purpose of the statute, and to break down the safeguards erected by the lawmaking branch of the government. To this we will add that, in our judgment, the authority of the decisions from Illinois is overborne by

an immense preponderance of cases from other states, some of which have been cited in this opinion. In this state we regard the principal question in this case settled by the ruling made in Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292.

A further point—one not made by counsel—has occurred to this court in its study of the record. It is this: The contract of August 6, 1895, was not proceeded by or based upon any ordinance enacted by the council of the city of Fargo authorizing the council to enter into the contract, or authorizing any officer of the city to make or sign the same. The only authority for signing the contract ever given was a mere resolution passed by the council. There is neither a statute of the state nor an ordinance of the city commanding the city council of the city of Fargo to make annual levies or appropriations of money to meet the expenditures required to be met by the terms of the contract. Under such circumstances we are unable to see in what manner the city council could be compelled, by mandamus or otherwise, to make the appropriations agreed to be made by the terms of the contract. If the contract cannot be enforced in accordance with its provisions, it is mere worthless paper. It is true that under the charter the city is vested with a general authority to provide "for lighting the city," but the manner of exercising this power is nowhere pointed out by the charter. In such cases the charter itself provides that the power shall be exercised through the medium of an ordinance. It was not so exercised in this case. On this point, see Engstad v. Dinnie, supra. Inasmuch as counsel have not discussed this point in this court, we shall refrain from passing upon the same in this case. We place our conclusions wholly upon the other features of the case discussed in this opinion.

It will follow from what has been said in this opinion that the trial court erred in dismissing the action. The judgment of the trial court will be reversed, and that court will be directed to enter judgment for the relief demanded in the complaint, together with the costs and disbursements of both courts. All the judges concurring.

STATE (PEAL, Prosecutor) *v.* MAYOR, ETC., OF CITY OF NEWARK *et al.*

STATE (O'ROURKE *et al.*, Prosecutors) *v.* SAME.

(*Court of Errors and Appeals of New Jersey, June 17, 1901.*)

[49 Atl. Rep. 468.]

Superintendents of Buildings—Appointment and Removal—Terms of Assistants.—The charter of Newark (P. L. 1857, p. 116) authorizes, through the common council of that city, regulation and inspection of buildings, and the appointment of necessary subordinate officers to hold during the pleasure of the council; every officer elected or appointed in

State *v.* Mayor, etc., of Newark

pursuance of the act to take and subscribe an official oath before entering upon his duties. Later general legislation, enacted after the constitutional amendment requiring regulation of the internal affairs of cities to be by general laws, authorizes the appointment in any city, by its common council, of a building inspector, to hold for a term to be fixed, within a stated limit, by the council, with specified duties, and other duties to be defined by the council. P. L. 1886, p. 321; P. L. 1899, p. 21. The common council of Newark ordained building regulations, and provided for an officer styled "superintendent of buildings," with substantially the powers of the general law, and appointed such an officer, and fixed his term at the maximum allowed by that law. It also appointed assistants to such officer, and attempted to fix for them like terms. *Held*, (1) that such appointment of "superintendent of buildings" must be taken to be that of the statutory "inspector of buildings"; that the appointee could not be removed by a succeeding council, at will, during the fixed term; and that his failure to take the official oath prescribed by the city charter, before he entered on his duties, did not deprive him of a standing to contest by certiorari his attempted removal from his office. (2) That the attempt to fix terms for the assistants, holding simply under the city charter as subordinate officers, was void, as against a succeeding council.

(Syllabus by the Court.)

Error to supreme court.

Certiorari by the state, on the prosecution of John H. Peal, and certiorari by the state, on the prosecution of John O'Rourke and William Reilly, against the mayor and common council of the city of Newark and others. Writs dismissed (48 Atl. 576, 578), and plaintiffs bring error. Judgment against Peal reversed, and against O'Rourke and Reilly affirmed.

Joseph A. Beecher, for plaintiffs in error.

McCarter & Adams, for defendants in error.

COLLINS, J. These cases may be conveniently considered together. The prosecutors challenged, so far as affected them, respectively, the municipal action of November 9, 1900, shown on the minutes of the common council of the city of Newark, as follows: "Ald. Bacheller moved that the position of superintendent of buildings now held by John H. Peal be, and the same is hereby, declared vacant. (Viva voce vote.) Carried. Ald. Bacheller moved that Leslie B. Tiller be, and he hereby is, appointed superintendent of buildings, at an annual salary of fifteen hundred dollars, payable monthly, said appointment to take effect at once. (Viva voce vote). Carried. * * * Alderman Bacheller moved that the positions of assistants to the superintendent of buildings now held by William Reilly and John O'Rourke be, and the same are hereby, ordered vacant. (Viva voce vote.) Carried. Alderman Bacheller moved that George Hicks and Moorehouse Battye be, and they hereby are, appointed assistants to the superintendent of buildings, at an annual salary of one thousand dollars each, payable monthly, said appointment to take effect at once. (Viva voce vote.)" The grounds of challenge were the same in each case, viz. that the prosecutors on April 13, 1900, by the previous council, had been appointed to their

offices, respectively, for terms of two years. The supreme court held the offices to be within the provisions of the twenty-first section of the charter of Newark (P. L. 1857, p. 116), authorizing appointment of "such subordinate officers not therein named as the common council should think necessary for the better ordering and governing the city and the carrying into effect the powers and duties conferred and imposed upon the common council" by that act. The charter provides in the same section that every person appointed to office under its provisions "shall continue in office until the office for which he shall have been appointed shall be declared vacant, or until another person shall be appointed to succeed him and shall enter upon the duties of his office."

The court was clearly right as to the officers held by O'Rourke and Reilly, and the necessary result is that the attempt of April 13, 1900, to fix a term for these offices, was ultra vires and void. Uffert v. Vogt (Err. & App.) 48 Atl. 574. But the Case of Peal is on a different footing. By the city charter (section 31, subd. 30) the common council is empowered to "regulate and control the manner of building dwelling houses and other buildings; * * * to regulate the construction of chimneys; * * * to prevent the setting up or construction of furnaces, stoves, boilers, ovens or other things in such a manner as to be dangerous; * * * to authorize any city officer or person or persons whom they may designate for that purpose to examine and inspect by day, any place or places for the purpose of ascertaining where the same is or are in a safe condition, and, if not, to direct or cause the same to be made so; to regulate or prohibit the carrying on of manufactories dangerous in causing or promoting fires; * * * to require all such further or other acts to be done, and to regulate or prohibit the doing all such further or other acts as they may deem proper to prevent the occurrence and provide for the extinguishment of fires in said city." The case is silent as to what was ordained under this authority, but incidentally it does appear that, in the revised general ordinance of 1889, there was reference to a "superintendent of buildings," and prescription of his duties. Doubtless that official title is of early origin. On April 28, 1886 (P. L. p. 321), it was enacted by the legislature as follows:

"An act concerning inspectors of buildings in cities of this state.

"Section 1. Be it enacted by the senate and general assembly of the state of New Jersey, that in all cities of this state it shall be lawful for the board of aldermen or common council of said cities to appoint one inspector of buildings.

"Sec. 2. And be it enacted, that said inspector of buildings shall be either an architect, carpenter, mason, or other mechanic, whom said board of aldermen or common council shall deem to be capable to fill the position, and that the duties of said inspector shall consist in the careful inspection

of all buildings in the course of erection, and any and all buildings undergoing repairs and alterations, and all buildings, chimneys and structures which have become dangerous or unsafe, and to see that proper precautions are taken for the protection of life and property.

"Sec. 3. And be it enacted, that before any person or persons shall erect, move, raise or commence to erect, move or raise, any building or buildings, the person or persons intending or desiring to erect, move or raise said building or buildings, shall first apply for and obtain from said inspector of buildings a permit to do so, and all failure to comply with this requirement shall be punishable by a fine, to be hereafter provided for by ordinance by said board of aldermen or common council: provided, that nothing herein shall affect the present powers of any board of fire commissioners to prohibit and regulate the erection or alteration of buildings and structures.

"Sec. 4. And be it enacted, that said board of aldermen or common council shall have power to further prescribe the duties and fix the compensation of said inspector of buildings, either by fee or fixed salary, and to fix his term of office, not to exceed one year.

"Sec. 5. And be it enacted, that said inspector shall at any time be removable for cause: provided, first, that charges and specifications having been preferred to said board of aldermen or common council, said board of aldermen or common council, by ballot, shall decide by a two-thirds vote of all the members of said board to remove said inspector of buildings.

"Sec. 6. And be it enacted, that all acts or parts of acts inconsistent with this act are hereby repealed, and that this act shall take effect immediately."

Approved April 28, 1886.

By an amendment approved March 8, 1899 (P. L. p. 21), the word "one" in the fourth section was changed to "two," thus authorizing an official term of two years.

Peal claims the protection of this legislation, while the defendants insist that it is permissive only, and has been given no effect in Newark. The supreme court, erroneously as we think, so held. This general legislation, enacted after the adoption of the constitutional amendment of 1875, prohibiting special and enjoining general laws regulating the internal affairs of cities, must be considered as supplemental to Newark's charter, and as repealing or superseding any inconsistent provision. Haynes v. City of Cape May, 52 N. J. Law, 180, 19 Atl. 176; Township of Kearney v. Ballantine, 54 N. J. Law, 194, 23 Atl. 821; Central N. J. Land & Imp. Co. v. City of Bayonne, 56 N. J. Law, 297, 28 Atl. 713. It is too plain for contrary argument that, if a common council makes an appointment within the purview of this legislation, all the statutory incidents must attach to the appointment. The powers, not the name adopted, will afford the test of the establishment of the office.

As before stated, Newark's revised general ordinance of 1889 is not before us, and we cannot be sure what were the duties of the "superintendent of buildings" therein referred to, but it is not too much to presume that they were substantially those contemplated by the act of 1886; for we find in the brief of counsel for the defendant the following concession: "The duties which the act outlines for the inspectors are practically identical with those which, under the various ordinances of Newark, the common council has prescribed for the superintendent of buildings." The argument, unsound, as we have seen, is that Newark's common council has continued to act under the city charter, ignoring the later general law. That law is self-operative, if the real, even though not nominal, office exists, and it is clear from the proofs in this case that it has always been regarded as in force in Newark, both by the common council and its appointees. In an ordinance to regulate the construction of buildings, approved May 2, 1896, which is in evidence, there is reference throughout to the "inspector,"—a term thus defined in section 6: "'Inspector' means the inspector of buildings appointed under provisions of this ordinance." No provision for appointment is contained in the ordinance, and the proof in the case is that the powers conferred have always been exercised by the incumbent of the office of "superintendent of buildings" already existent. Section 3 of this ordinance devolves on the "inspector" the duty of granting or refusing of a permit for the erecting, repairing, changing, or altering any building or structure within the limits of the city,—a function in terms vested in the officer contemplated by the act of 1886. On June 29, 1896, there was approved an ordinance couched in form as an amendment to section 131 of "An ordinance comprising the ordinances of the city of Newark," filed October 2, 1889, which reads as follows:

"Sec. 131. There shall be appointed by the common council of the city of Newark an officer to be designated as superintendent of buildings of the city of Newark; said superintendent shall be an architect, mason or carpenter, who shall devote his whole time and labor to the discharge of the duties of his office as herein defined and who shall receive for his services the annual salary of fifteen hundred dollars. There shall also in like manner be appointed an assistant to said superintendent of buildings, who shall be an architect, mason or carpenter, who shall devote his whole time and labor to duties assigned to him by the superintendent of buildings and assist him in the work of the office under his directions and who shall receive for his services the annual salary of one thousand dollars."

On May 21, 1897, the prosecutor Peal was appointed by the common council "superintendent of buildings." The oath administered to him was to perform the duties of "inspector of buildings." On August 6, 1897, George Thompson was

appointed "assistant superintendent of buildings." The oath administered to him was to perform the duties of "assistant building inspector." On September 1, 1899, without any ordinance to increase the number of assistants, the prosecutors O'Rourke and Reilly were appointed "assistants to the superintendent of buildings," and took official oaths under that title. On April 13, 1900, a resolution was adopted by the council appointing Peal "superintendent of buildings" for the period of two years from May 1, 1900, at a salary of $1,500 per year, payable monthly. This resolution was presented to the mayor, April 16, 1900, and filed without his signature, April 27, 1900, and Peal filed on May 1, 1900, his written acceptance of the office. If the office was in fact that contemplated by the acts of 1886 and 1899, this resolution, by legal authority, fixed a term therefor during which Peal can be removed therefrom only for cause.

But the defendants, changing their ground, put forth the claim that another person, namely, George Thompson, was on April 13, 1900, appointed by the council to an office styled "inspector of buildings," and that he must be taken to be the officer contemplated by the acts of 1886 and 1899. Thompson was appointed on that day to an office, and has not since been disturbed; but it is plain that he was not appointed to a new office, but was merely reappointed to that he had previously held. It will remembered that in 1897 he had been appointed "assistant superintendent of buildings," and had been sworn in as "assistant building inspector." The defendants now produce from the files of the city clerk a resolution purporting to have been that adopted April 13, 1900, which reads as follows: "Resolved, that George Thompson be, and he is hereby, appointed inspector of buildings of the city of Newark for the period of two years from and after the 1st day of May, 1900, at the annual salary of $1,000, payable monthly;" but, unfortunately for the defendants' contention, the minutes of the council, also in evidence, recite the resolution adopted as appointing Thompson "assistant superintendent of buildings" for the term and at the salary stated. Strangely enough, the resolutions of the same meeting appointing O'Rourke and Reilly for a like term, and at a like salary, each style the office to which the appointment is made as "assistant to the superintendent of buildings," while the minutes of the council recite the resolution adopted in each case as appointing to the office of "inspector of buildings."

The fact seems to be that, colloquially, the head of the building department has in Newark always been called "superintendent," and his subordinates have indifferently been called "inspectors" or "assistants to the superintendent." Hence the indiscrimination in the official procedure. It is perfectly clear that the outgoing council on April 13, 1900, meant to secure the tenure of all the officials of the department by fixed stated terms for them. As to the three assist-

ants, this was ineffectual for the reason above stated, viz. that their appointment could rest only on the charter, as that of subordinate officers thought necessary by the council, and holding at pleasure of the appointing power. The council could not bind its successors. The head of the department, however styled, was the inspector of buildings, whose appointment was authorized by the act of 1886. If there were no other way of determining which of the four officers was the head, the larger salary fixed for him marks Peal as such, and, besides, the proofs show him to have been such in fact. The fire-escape law of 1899 (P. L. p. 359), undoubtedly framed with the situation of Newark in mind, speaks of the "chief building inspector," and the uncontradicted testimony is that Peal has always performed the duties imposed by the act, and, further, that there has never been any difference as between Thompson, O'Rourke, and Reilly with respect to their duties, each being in charge of a territorial district, and being subordinate of Peal.

Lastly, the defendants urge that Peal has no locum standi, because he has not since his last election complied with section 24 of the city charter, which reads as follows:

"Sec. 24. And be it enacted, that every person who shall be elected or appointed to any office in pursuance of this act shall, before he enters upon the duties of his office, take and subscribe before the city clerk or the mayor of said city, the oath of allegiance to this state, and likewise an oath or affirmation that he will faithfully and impartially execute the trust reposed in him, according to the best of his ability and understanding; which oaths shall be filed and preserved in the office of the said clerk."

The defendants prove that no oath subscribed by Peal, taken since his last appointment, is on file in the clerk's office, and that fact, together with his silence on the subject, may justify the assumption that none was taken. It is not clear that the section applies to an appointment under the act of 1886, but, whether so or not, it is directory only, and imposes no forfeiture. Peal did enter on the duties of his office, and can take the oath at any time. Possession under claim of right is all that he needs to enable him to resist an attempt to remove him, except upon charges preferred. The judgment in Peal's Case will be reversed, and the record will be remitted, with directions to set aside the action brought up by this writ. The judgment in the O'Rourke and Reilly Case will be affirmed.

CLARK *v.* CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, Suffolk, June 19, 1901.)

[60 N. E. Rep. 793.]

Employment of Veterans by City*—Action for Employing Others in Preference to.—Where a veteran was from time to time employed by a city, he cannot maintain an action against the city for failure to employ him, when there was work to do, in preference to another man, not a veteran, under St. 1896, c. 517, § 5, forbidding the removal or suspension, except after hearing, of any veteran holding an office or employment in the public service of any city, since such statute does not apply to such an employment.

Veteran Employed by the Job—When to Be Considered as Discharged or Suspended.—Where a veteran is employed by the city only by the job, he is not discharged or suspended, within the meaning of St. 1896, c. 517, § 5, forbidding the removal or suspension, except after hearing, of any veteran employed by any city, where he receives no pay after his special task is done.

Contract between Veteran and City—Ignorance of Provisions.—Where a veteran employed by a city could read, and there was no misrepresentation as to the contract he signed, his testimony that he did not know what the contract was, and did not intend to waive his right, would not affect the binding quality of the contract.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Action by John C. Clark against the city of Boston. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

E. J. Horgan, for plaintiff.
Samuel M. Childs, for defendant.

HOLMES, C. J. The plaintiff is a veteran who, we assume, has worked as a plumber in the Repairs Division of the Public Buildings Department of the City of Boston. He brings this action for a failure to employ him, when there was work to do, in preference to another man not a veteran, to whom work was given. The right of action is supposed to spring from St. 1896, c. 517, § 5, forbidding the removal or suspension except after hearing of any "veteran holding an office or employment in the public service of any city or town."

Technically the questions sought to be argued are cut off by the finding of the judge before whom the case was tried that the plaintiff never held an office or employment within the meaning of the statute. It does not appear what evidence the judge believed. We could not say that he found that the plaintiff ever was employed by the city at all. But we assume that the finding really means that the plaintiff was employed as a plumber from time to time, and was paid for what he did, but was not employed continuously all the time, and that

*Preference of veterans under statute, see Brown *v.* Russell *et al.*, Civil Service Com'rs, 32 L. R. A. 253; *In re* Keymer, 148 N. Y. 219, 35 L. R. A. 447; Opinion of the Justices, 166 Mass. 589, 34 L. R. A. 58.

it implies a ruling that the section does not apply to such an employment. Very plainly it does not, and although we should be slow to admit the validity of a contract by which a department undertook to hamper the working of the statute, it would seem that the contract which it is found that the plaintiff signed was intended mainly to emphasize the fact that he was not employed continuously, and so did not fall within the provision upon which he relies.

It needs no argument to prove that when a man is employed only by the job he is not discharged or suspended if he receives no pay and is left free when his task is done. It is not argued that the statutes forbid such a method of employment, which probably is necessary in some kinds of work.

From what we have said it is evident that it is not necessary to consider the suggestion that the contract, if valid, did not waive any rights. But, in view of the argument, it may be worth while to add that of course the plaintiff's testimony that he did not know what the contract which he signed was and that he did not intend to waive his rights, if accepted, would be no answer to a contract not otherwise open to objection. There was no misrepresentation of the instrument, and the plaintiff could read. If a man signs a lawful contract and the other side is not privy to any improper motive for his signing it, such as may be created by fraud, duress, or mistake as to its contents, he is bound, whatever his voluntary ignorance or his involuntary misinterpretation of its words. Rice v. Manufacturing Co., 2 Cush. 80, 87; Black v. Bachelder, 120 Mass. 171; West v. Platt, 127 Mass. 367, 372. See Donohue v. Woodbury, 6 Cush. 148, 151, 52 Am. Dec. 777.

Exceptions overruled.

LEONARD v. CITY OF BUTTE.

(*Supreme Court of Montana, June 17, 1901.*)

[65 Pac. Rep. 425.]

Sidewalks—Defects*—Question for Jury.—In a sidewalk composed of cement blocks, four were broken and replaced. The new blocks were so hard and smooth that 100 persons slipped and fell thereon in about a year, and 25 fell within two months of plaintiff's accident. *Held*, that the question whether the walk was defective and in a dangerous condition was for the jury.

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*See *note* to City Council of Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 566 *et seq.*; Vergin *v.* City of Saginaw, 5 Mun. Corp. Cas. 275, and *note*.

Municipal liability for acts of independent contractors, see 5 Mun. Corp. Cas. 374.

Plaintiff assuming the risk, see *notes*, 4 Mun. Corp. Cas. 648 *et seq.*

Unconstitutional statute exempting municipality and council from liability for defective streets, see Mattson *v.* City of Astoria, 65 Pac. Rep. 1066, *ante*, 591; *notes*, 2 Mun. Corp. Cas. 64; 5 Mun. Corp. Cas. 572,

Leonard *v.* City of Butte

Same—Same—Notice*—Question for Jury.—Where four blocks in a cement sidewalk differed from the others, and were so slippery that 100 people had fallen thereon within a year, and 25 within two months,—one of them being seriously hurt, and another being helped up by a policeman,—and the place had grown so notorious that it caused amusement among the passers when persons fell there, the question whether the city authorities had notice, actual or constructive, of the defect, was for the jury.

Same—Same—Instructions—Harmless Error.—Where, in an action against a city for injury caused by a defective sidewalk, the jury are correctly instructed as to the duty of the city relating to walks, but the court, in a paragraph relating to the notice to the city of a defect, declared its duty to be to keep sidewalks "in good condition and safe," instead of in a reasonably safe and good condition, the verdict should not be set aside on that ground, since it was manifest the jury could not have been misled by the charge as a whole.

Appeal from district court, Silver Bow county; John Lindsay, Judge.

Action by Philip P. Leonard against the city of Butte. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. M. Lamb, for appellant.

M. J. Cavanaugh, for respondent.

BRANTLY, C. J. This action was brought by the plaintiff to recover damages for personal injuries alleged to have been caused by a defect in a sidewalk upon one of the principal streets of the defendant while plaintiff was traveling thereon. There were a verdict and a judgment for plaintiff. The appeal is from the judgment and an order denying a new trial. The questions presented to this court are whether the evidence is sufficient to justify the verdict, and whether the court misdirected the jury to the prejudice of the defendant.

1. Counsel for the defendant contends that the evidence is insufficient to justify the verdict, in two particulars: (1) In that no defect was shown to exist in the sidewalk in question; and (2) in that, though a defect was shown to exist, it was not known to the defendant.

From the evidence it appears that the walk in question was upon the east side of Main street, between Quartz and Granite streets, and that there was a great deal of travel over it. It was constructed in 1892 of cement flags about three feet square. The grade of the street and walk at that point is considerable. From some imperfection in construction, four of these flags, covering a space about six feet square near the middle of the walk, in front of Mullins' grocery store, became chipped and broken to such an extent that in the spring or

*Presumption of notice, see *note* to Dundas *v.* Lansing (Mich.), 5 L. R. A. 144-146; Village of Shelby *v.* Clogett, 46 Ohio St. 549, 5 L. R. A. 606; *note*, 5 L. R. A. 255; Burns *v.* City of Bradford (Pa.), 11 L. R. A. 726; *note*, 22 L. R. A. 829; Thomas *v.* City of Flint (Mich.), 47 L. R. A. 499; Moore *v.* Kennakee (Mich.), 4 L. R. A. 555; Tyler *v.* Williston (Vt.), 9 L. R. A. 338; *notes*, 10 L. R. A. 179, 180, 476, 738, 739; 5 Mun. Corp. Cas. 148; 2 Mun. Corp. Cas. 737; 1 Mun. Corp. Cas. 474 *et seq.*; Bradbury *v.* Inhabitants of City of Lewiston, 49 Atl. Rep. 1041, *ante*, p. 588.

summer of 1895 they were removed, and four others substituted in place of them. The substituted flags differed in appearance from the rest of the walk; no coloring matter having been used in their construction, as was the case with those first laid. They seemed to be unusually hard and smooth; some of the witnesses stating that they had a hard, greasy, or oily appearance, and were as smooth as glass. The employees in Mullins' store first observed persons slipping and falling at this point in the fall of 1895. After that time such occurrences were very frequent. One witness states that while he was working for Mullins, between November, 1895, and January, 1896, he saw as many as 25 persons fall there; on some of these occasions he saw city officials in the neighborhood, and once a policeman assisted a woman who had fallen. Another states that he saw as many as 100 persons slip and fall there at various times before the accident by which plaintiff was injured. These accidents always occurred at the point where the four new flags had been laid, and became so frequent that they were the occasion of a great deal of mirth to other persons in the vicinity who observed them. This witness went to work for Mullins on November 3, 1895. To prevent accidents to Mullins' employees and customers, as well as others, he put dirt or sawdust upon this portion of the walk two or three times a day. He himself fell there and broke his kneecap on July 31, 1896. Accidents always befell passengers going down the street. Those going up experienced no trouble. The condition of the weather made little or no difference. This condition of the walk remained unchanged until after plaintiff fell there on the morning of December 11, 1896, when, under the direction of Mullins, this witness and another of his employees cut grooves with a chisel in the surface of these four flags at right angles with the line of grade. After this no accidents occurred. Under the ordinances of the city, abutting lot owners are required to construct and keep in repair the walks in front of their property. The construction and repairs are required to be of such material as is prescribed by ordinance or resolution of the city council, and to be done to the satisfaction of the street and alley committee or the street commissioner, under the superintendence of the city engineer. It is the duty of the city marshal and all policemen to report to the street commissioner any defects in sidewalks, and, in case of accident, to report the same to the city attorney, with the names of the witnesses. The city engineer is required to fix the grade of the streets and sidewalks, and to see that all work of construction and repairing is properly done. These ordinances were in force at the time of the accident. In this particular instance neither the original construction nor the work of repair was ever formally approved by the city authorities, all having been done under contract let by the abutting owner. A great deal of evidence was introduced by defendant tending to show that the flags used in

repairing the walk were of good materials, properly proportioned, and that the walk was as good as any other of similar construction in the city. There is no proof tending to show that any person made complaint to any of the city authorities about the condition of the alleged defect, though it does appear that such complaint was made to the owner of the building from whom Mullings leased his store.

Counsel argue that upon this evidence this court should declare, as a matter of law, that no defect was shown to exist in the sidewalk in question. The position thus assumed is untenable. There is no controversy upon the evidence but that passengers descending along this walk experienced difficulty in retaining their footing at the point where the repairs had been made, and often met with disaster. We are unable to see why a smooth and slippery condition of a walk, caused wholly by the peculiar construction of it, or resulting from wear by use of the material of which it is composed, may not be a defect, as well as a condition resulting from a fault in construction or from natural decay. A sidewalk upon which a person cannot step without peril of limb from slipping and falling seems equally as defective as one upon which he is constantly in danger of falling from stumbling, or in which there are unguarded openings rendering passage over it dangerous. It was held by the Illinois court of appeals in City of Centralia v. Baker, 36 Ill. App. 46, that it was a question for the jury whether a sidewalk on the principal street of the village was defective and dangerous because one of the boards out of which it was constructed was so warped by sun and rain as to stand a small distance above the general level, thus presenting an obstruction against which a passenger was liable to stumble and fall. In Cromarty v. City of Boston, 127 Mass. 329, 34 Am. Rep. 381, the court considered a case in which the injury was caused by a passenger falling upon a portion of a walk rendered smooth and slippery by constant use. The particular portion of the surface of the walk in question was formed by a "Hyatt patent cover," made partly of iron and partly of glass, and presumably designed to close some opening in the walk. Counsel for the defendant contended that inasmuch as the general surface of the walk was level, and the "cover" was level with the rest of the walk, there was no evidence of a defect. The court said: "This position cannot be maintained. It cannot be said, as matter of law, that smoothness and slipperiness of a sidewalk, resulting from the condition of the surface of the material of which the walk is made, and not dependent on nor resulting from atmospheric influences, may not render the walk so unsafe and inconvenient for travelers thereon as to be defective and out of repair, within the meaning of the statute. If a walk is constructed of material so smooth and hard that travelers shod in the ordinary way are defeated or obstructed in their attempts to pass over it by inability to get the hold upon it

with their feet which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk cannot be said, as matter of law, to be safe and convenient. And if, in a sidewalk, the chief part of which is in proper condition for travel, a small part of the surface is constructed of material different from the remainder, and so smooth and slippery that a foot traveler, stepping suddenly upon it from the portion otherwise constructed, necessarily or probably slips, and is likely to fall, it cannot be said, as matter of law, that such walk is not defective." These remarks are entirely pertinent to the present case. Here the claim is made by plaintiff that the walk was defective. In support of this claim it is shown that many persons had slipped and fallen in the same place,—some 25 in the course of two months, and 100 during about a year's time. One sustained a serious hurt, though accustomed to pass over it in the course of his employment every day, perhaps many times each day. Attempt were made to remove the trouble but putting dirt and sawdust upon the dangerous spot. Finally, when the surface was grooved by Mullins' employees, the difficulty disappeared. We think that the facts shown present a question for the jury, and not for the court, and that the case falls within the general rule that whether or not there is in fact a defect is a question for the jury. Sullivan v. City of Oshkosh (Wis.) 13 N. W. 468; McCloskey v. Moies (R. I.) 33 Atl. 225; Harris v. Inhabitants of Great Barrington (Mass.) 47 N. E. 881; Todd v. City of Troy, 61 N. Y. 506.

We are also of the opinion that the evidence warranted a finding that the city authorities had notice of the defect. Part of the evidence showing that a policeman observed an accident on one occasion, and lent his assistance to aid a woman who had fallen, tended to show actual notice to the city. It was his duty, under the ordinance, to report to the street commissioner if there was a defect, and, presumably, he performed his official duty. Twogood v. City of New York, 102 N. Y. 216, 6 N. E. 275; Rehberg v. Mayor, etc., 91 N. Y. 137, 43 Am. Rep. 657; City of Denver v. Dean, 10 Colo. 375, 16 Pac. 30; Farley v. City of New York, 152 N. Y. 222, 46 N. E. 506; Elliott, Roads & S. (2d Ed.) § 629. But, even without this item of evidence, and conceding that no duty rested upon the policeman to make report, we think the facts and circumstances shown by the evidence properly presented a case for the jury as to constructive notice. The defect, if it was one in fact, had existed for about a year. It had grown to be quite notorious in the neighborhood, so that it caused amusement among the passengers when persons fell there. At least one serious accident had happened there. It was on a street where there was much travel, and so many falls had occurred there that dirt or sawdust had been cast upon it from day to day to increase the friction, and thus lessen the danger. It is hardly conceivable that this condi-

tion should exist for a whole year without being in some way brought to the attention of some of the officers of the city whose duty it was to remedy it. In any event, the evidence is sufficient to be submitted to the jury upon the question of constructive notice. "Wherever the defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of the defect, notice thereof will be presumed. Having means of knowledge, and negligently remaining ignorant, is equivalent to knowledge. It is generally for the jury to determine, as a question of fact, whether a city has notice or not, although it may become a question for the court where the facts are undisputed, and but one reasonable inference can be drawn from them." Id. § 626.

2. Counsel for defendant criticise paragraph 2 of the instructions on the alleged ground that it declares it to be the duty of a city to keep sidewalks "in good condition and safe" for the passage of persons traveling over them. We understand the rule to be that a city is bound only to use reasonable care in keeping its streets and sidewalks in a reasonably safe and good condition for travel (Dill. Mun. Corp. § 1019), exercising reasonable care in inspecting them to discover any defects therein (Id. § 1025). Having observed both of these precautions, reasonable attention being had to the effects of natural deterioration and decay, the authorities will have discharged their full duty. The paragraph under consideration is inaccurate, in that it omits to state that reasonable care, only, is the measure of duty. Yet, when all of the instructions are read together, we think it is apparent that the jury could not have been misled by this error. Paragraph 2 was intended to be a statement of the rule of law as to notice to the city authorities before liability could attach, and it is in connection with the statement of this rule that the inaccurate expression was used. Other paragraphs state clearly and accurately the law relative to the duty of the city generally, and as applied to this particular case. Upon the whole of the instructions upon this point, we think it is clear that the defendant suffered no prejudice. Counsel also find fault with paragraph 3 of the instruction, in that it assumes the existence of the alleged defect, instead of leaving the question of its existence to be determined by the jury. In the preceding instruction the court had clearly and explicity left it to the jury to find whether there was a defect in the walk as alleged, and whether the city had actual notice of it, and, if not, whether, under all the circumstances, and by the exercise of reasonable diligence, it should have had notice of it. In paragraph 3 the expressions "the defect" and "the unsafe condition" were inadvertently used, the court thus speaking for the moment as if the alleged defect stood as an admitted fact. The word "any" should have been used for "the" in each of the expressions,

but, taking the whole charge together, we do not think the defendant has suffered prejudice. The cause seems to have been carefully tried, and, except in the particulars mentioned, the charge was correct, and fairly submitted to the jury all the questions involved in the case. The judgment and order appealed from are affirmed. Affirmed.

PIGOTT and MILBURN, JJ., concur.

In re LORD.

(*Court of Appeals of New York, June 11, 1901.*)

[60 N. E. Rep. 748.]

Inspection of Public Records*—Right of Taxpayer to Inspect Tax Books.—Greater New York Charter, § 1545, provides that all books in any department shall be open to the inspection of a taxpayer, subject to reasonable regulations. Section 892 provides that the annual records of assessed valuation of real and personal property shall be open for examination by persons believing they are assessed on their personal property. *Held*, that a taxpayer has no absolute right to a general and unlimited inspection of the tax records, and an order allowing such inspection, on condition that the applicant furnish names of the estates and taxpayers whom he represents, was proper.

CULLEN and LANGDON, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

In the matter of the application of Franklin B. Lord for an order requiring the board of taxes and assessments of the city of New York to permit him to inspect public records, From an order of the appellate division (69 N. Y. Supp. 678) affirming an order of the special term granting the prayer of petitioner, with certain limitations, he appeals. Affirmed.

Henry De Forest Baldwin and Charles J. Fay, for appellant.

John Whalen, Corp. Counsel (James M. Ward, of counsel), for respondent.

BARTLETT, J. The petitioner seeks in this proceeding an order directing the commissioners of taxes and assessments, who constitute the board of taxes and assessments of the city

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*Ordinarily the right to inspect public records, tax books, etc., may be enforced by mandamus. Neville *v.* Board of Health, 21 N. Y. S. 574, 29 Abb. N. C. 59; Stockman *v.* Brooks (Colo. Sup.), 29 Pac. Rep. 746; Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262; Scott *v.* President of Police Jury of Richland (La.), 14 So. Rep. 521; 1 Greenleaf, Evidence §§ 471, 478, 1 Tidd Pr. 593; High, Extr. Remedies, § 330; Dillon, Mun. Corp. (4th Ed.) §§ 303, 848; Rex *v.* Justices, 6 Adol. & E. 84.

But a mandamus will not lie to compel a county clerk to allow private parties to occupy his office for months for the purpose of making abstracts of all the records of the county. Bean *v.* People *ex rel.* Uppercu *et al.* (Colo.), 2 Pac. Rep. 909. Nor to compel a clerk to permit a newspaper to inspect papers in a suit not yet tried, the suppression of which papers has been requested by the parties to the suit. Schmedding *v.* May (Mich.), 48 N. W. Rep. 201.

of New York, to permit him, on his own behalf and on behalf of others named, to examine the annual record of the assessed valuation of real and personal estate of the borough of Manhattan for the year 1901. The petitioner alleges, in substance, that he is a taxpayer upon property within the city of New York assessed at more than $1,000, and that he also represents various taxpayers as executor, trustee, or attorney at law; that inspection of said record has been denied him. The special term, after hearing counsel for the petitioner and the commissioners, granted the order for inspection, specifying the time and manner thereof. The petitioner, deeming himself aggrieved by the limitations placed upon the inspection and the refusal to allow a general inspection, appealed to the appellate division, where the order was unanimously affirmed. An appeal was then taken to this court. The Greater New York charter provides (section 892) that said record shall be open for examination and correction from the second Monday in January until the first Monday in May, and that during the time the books are open for inspection the fact shall be advertised in the city record. Section 1545 of the charter provides that in case such inspection is refused the taxpayer making the application may apply to any justice of the supreme court for an order allowing it at such time and in such manner as the justice shall authorize. In opposing the motion of the petitioner, the commissioners showed that the record in question for the year 1901, exclusive of the books of assessment of shares of bank stock in the borough of Manhattan, consists of 11 volumes, containing 50,815 names; that during this time of public examination these books are in constant use in furnishing information to persons applying for the revision and correction of assessments against them, the average number of applications daily being from 700 to 800. It is apparent that the inspection accorded the taxpayer must be reasonably regulated, or it would be impossible to complete the work of revision and correction between January and May. The only question presented for determination at this time is whether the petitioner has been awarded his statutory rights in this particular proceeding.

The petitioner asked inspection on his own behalf individually, on his own behalf as executor or trustee, and in his capacity as attorney at law consulted by various persons, some of whom had been notified they were assessed, some of whom had received no notices, but who, as petitioner was informed and believed, had been assessed, and some of whom petitioner had no reason to believe had been assessed, but who had requested him as their attorney to determine such fact by an inspection of the record. The special term granted the prayer of the petition, and the commissioners were ordered to allow the petitioner to make such inspection at the times and in the manner set forth in the order, as follows: "(1) That the inspection shall be made between the hours of nine

and ten in the morning of such day or days, within ten days after the service of a copy of this order upon the board of taxes and assessments, as that board may indicate as most convenient for the dispatch of public business. (2) That the leave of the petitioner to inspect the books is limited to an inspection of the assessments affecting either the petitioner individually, or as executor or trustee, or taxpayers whom the petitioner represents as attorney. (3) That before the petitioner proceeded to inspect the records of the assessed valuations of real and personal property in the borough of Manhattan for the year 1901 he shall furnish the commissioners of taxes and assessments with the names of the estates which he represents as executor or trustee, or in any representative capacity, and the names of the taxpayers whom he claims to represent as attorney. (4) That the entries in the record of assessed valuations of real and personal property in the borough of Manhattan for the year 1901, as indicated by the list of names directed to be furnished as above, may be, and the commissioners are required, as directed above, to furnish the petitioner opportunity to inspect under their personal supervision, or that of such officer, clerk, or employee of the department as they may designate for that purpose. And it is further ordered that the petitioner's application for a general and unlimited inspection is denied."

We are of opinion that the terms of this order are reasonable, and enable the petitioner to acquire all the specific information asked for by him individually, and as executor or trustee, and as an attorney at law representing certain clients who are taxpayers. While the provisions of the charter are to be construed with a due regard for the interests of the individual taxpayer, it is also the duty of the court to protect the rights of the taxpayers as a body, and so regulate inspection that the vast volume of public business in the office of the commissioners can be duly transacted. If each taxpayer in the borough of Manhattan is vested with the absolute statutory right to make a general and unlimited inspection of the 11 volumes of the record, containing 50,815 names, it is perfectly apparent that the work of revision and correction, within the short time allowed by law, would be impossible. We are not called upon at this time to determine the limits of a taxpayer's right of inspection. In the case at bar the petitioner has been allowed to examine his individual assessment, and the assessment of all those taxpayers he represents in any capacity, and the only claimed right denied him is a general and unlimited inspection of the record. The necessity for examining the tax record will undoubtedly arise in many cases and under varying circumstances not to be anticipated, and each application must, therefore, be dealt with according to its peculiar facts. The courts will see to it that the rights of the taxpayer are properly protected. We decide in this case that the prayer of the petitioner was properly granted as

to the specific information he sought, and that the limitations and conditions imposed by the court as to the time and manner of inspection were lawful and reasonable. Also that the petitioner was not entitled, under the facts disclosed, to a general and unlimited personal inspection of the 11 volumes of the personal tax record relating to the borough of Manhattan. The order appealed from should be affirmed, with costs.

CULLEN, J. (dissenting). I am constrained to dissent in the decision about to be made. The Greater New York charter, by section 892, directs that the record of assessed valuations of real and personal estate shall be open for examination from the second Monday of January until the first Monday in May in each year. The petitioner, as a taxpayer, is interested, not only in the assessment for personal property levied on himself, but also in those imposed on others; for the greater the assessment on others the less will be the amount of taxes which he will be ultimately compelled to pay. The right of the petitioner to this examination is not singular to him, but shared with every other taxpayer in the county, and the records are required for use by the public officials who make up the tax rolls. The relator's right to inspection can be exercised only consistently with the equal rights of the other taxpayers and the necessary use of the books by the city authorities. Therefore it would be entirely proper for the court to prescribe at what times and in what manner the petitioner shall make his inspection; but the order appealed from goes much further, and not merely prescribes the manner of inspection, but limits the character of the examination itself by confining the petitioner to ascertaining only the assessments imposed on himself or his clients, and forbidding an access to assessments imposed on others. The petitioner is therefore deprived of his statutory rights. The order appealed from should be reversed, and the matter remitted to the special term, with directions that the petitioner be allowed access to all assessments, his inspection to be made at such times and in such manner as the court may deem proper.

PARKER, C. J., and O'BRIEN, MARTIN, and VANN, JJ., concur with BARTLETT, J. LANDON, J., concurs with CULLEN, J.

Order affirmed.

CITY OF CHICAGO *v.* BORDEN.

(*Supreme Court of Illinois, June 19, 1901.*)

[60 N. E. Rep. 915.]

Alleys—Whether Public or Private.—The owner of a city lot conveyed a strip thereof, in a deed executed also by the grantee, whereby the grantee covenanted that the strip should remain forever as and for an

alley, for the enjoyment of the owners and occupants of said lot and other premises lying on said alley. *Held*, that the strip is a private alley.

Same—Ways by Which Private Alley May Become Public.*—An alley originally private cannot become public except by condemnation; by grant, including 20 years' use, implying a grant; or by dedication.

Same—Same—Adverse User—Prescription.—Where a private alley for the use of abutting owners is used only by such owners and persons doing business with them, and occasional permissive use by other persons, who make no claim of right thereto, there is no adverse user which will convert the alley into a public alley by prescription.

Same—Same—Same.—Where a city assessor made a plat on which a private alley was marked as a strip open at one end and closed at the other, and the surrounding lands were thereafter assessed as subdivided on such plat, such action did not constitute an adverse claim to or occupation of such alley by the public.

Same—Same—Effect of Failure to Assess for Taxes.—A private alley is not changed into a public alley by the failure of the public officers to assess it or levy taxes thereon.

Same—Same—Effect of Assessment of Adjoining Property by City for Improvement of Private Alley as Public Highway.—Where a city assessed property abutting on a private alley for its improvement as a highway, and the owner of the alley paid the amount assessed against his property, the alley did not thereby become public, since the owner of the alley could not be deprived of his title by unauthorized proceedings by the city.

Appeal from circuit court, Cook county; R. W. Clifford, Judge.

Action by John Borden against the city of Chicago. From a judgment for plaintiff, defendant appeals. Affirmed.

The original bill in this case was filed on July 25, 1899, and the amended bill on October 19, 1899. The bill was filed by the appellee against the appellant for the purpose of enjoining appellant, its officers, servants, etc., from interfering with the appellee in the excavation of areas or cellars under a portion of an alley, alleged to be a private alley, running north from Washington street, in the city of Chicago, in the rear of, and lying 90 feet west of, State street. The original and amended bills allege that appellee is the owner in fee of the north 90 feet of said alley, subject to an easement therein belonging to the owners of the property abutting thereupon. The bill also alleges that the appellee is the owner of the adjoining property lying east of the north 90 feet of said alley, and extending to State street, in the city of Chicago. The court entered a decree substantially in accordance with the prayer of the bill, and the present appeal is prosecuted from such decree.

The facts, as gathered from the pleadings, the proofs, the master's report, and the decree, are substantially as follows:

The alley in controversy is described as W. 10 feet of the E. 20 feet of the N. 90 or 91½ feet of lot 7 in block 37 in the

*Dedication of alleys, streets, highways, parks, etc., see Reuter *v.* Lawe, Exrx. (Wis.), 34 L. R. A. 733, briefs, 734, 735; Southern Pac. R. Co. *v.* Ferris (Cal.), 18 L. R. A. 510, and *note*; *notes*, 5 Mun. Corp. Cas. 197; 4 Mun. Corp. Cas. 251, 296; 3 Mun. Corp. Cas. 354; 1 Mun. Corp. Cas. 345, 763.

original town of Chicago. Block 37 is bounded by Washington street on the south, Randolph street on the north, Dearborn street on the west, and State street on the east, and lies in the S. ½ of section 9, township 39 N., range 14 E. of the third P. M. The alley of which the 90 feet in question is a part extends from Washington street northward through said block 37 180 feet, more or less, to an alley 18 feet wide, running east and west from State street to Dearborn street, in said city.

The alley in controversy is located upon the W. 10 feet of the E. 20 feet of lot 7, as shown upon the above plat.

In 1863 the county clerk, for the purpose of taxation, caused a survey to be made, and a plat to be recorded, called "Assessor's Division of Lots 1, 2, 7, and 8 in block 37."

The N. ½ of lot 8 in block 37 and the N. ½ of the E. 10 feet of lot 7 in block 37 are the same as lot 10 upon the plat of the said assessor's division, and are owned by the appellee. Appellee also owns a building located upon the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, which building fronts upon State street, in the city of Chicago, and runs back westwardly to the 10-foot alley herein in controversy, and is bounded upon the north by the east and west alley, 18 feet wide, and on the south by what is known as the "Stewart Building," located upon the S. ½ of lot 8 and the S. ½ of the E. 10 feet of lot 7, otherwise known as lots 13 and 14 in said assessor's division. The Methodist Book Concern has a building upon lot 7, fronting upon Washington street, and extending north towards the 18-foot alley, and the east side of which abuts upon the 10-foot alley in question. On August 28, 1844, Hugh T. Dickey was the owner in fee, by patent from the state of Illinois, of said lot 7; and on that day he conveyed, by warranty deed, which was duly recorded on December 23, 1844, to Hibbard Porter, as party of the second part, the E. 20 feet of the N. 90 feet of said lot 7,—the deed being signed by Porter, the grantee, as well as Dickey, the grantor,—which said deed contained the following declaration, to wit: "It is hereby declared by the said party of the second part, for himself, his heirs, executors, administrators, and assigns, that a strip ten feet wide by ninety feet deep, being the west one-half of the above-described premises, are [is]to remain forever open and unobstructed as and for an alley, for the free use and enjoyment of the owners and occupants of said lot 7 in block 37 in common with the owners and occupants of the other lots of land and premises lying upon said alley." By deed bearing date November 28, 1845, and recorded on June 7, 1847, Hugh T. Dickey, being the owner of the premises hereinafter described, conveyed the E. 20 feet of the S. 91 9-24 feet of said lot 7 to Hart L. Stewart and James W. Sanger, "excepting and reserving the uninterrupted use, easement, and enjoyment forever of the west one-half of the above-described premises, being ten feet in front and rear by 91 9-24 feet deep, as and for an alley, to be

kept forever open, free, clear, and uninterrupted, to remain forever as an alley for the use of the owners and occupants on both sides of said alley." It may be here remarked that block 37 contained 8 lots, each 80 feet front by 180 feet deep; lots 5, 6, 7, and 8 fronting upon Washington street. On May 2, 1864, Hibbard Porter and wife, by deed of that date recorded May 9, 1864, conveyed to Uranus H. Crosby the E. ⅛ or the E. 10 feet of the N. ½ of said lot 7; also the undivided 9-10 of the N. ½ of said lot 8, fronting on State street 91 feet and 4 inches; also all the life interests of said Porter and wife in the undivided 1-10 of said portion of lot 8; "also all the right, title, and interest of said first party [being Hibbard Porter and wife] in and to an alley abutting upon the said first-described parcel of land lying west of and adjoining the same." By mesne conveyances from Uranus H. Crosby, Samuel M. Nickerson and Isaac Crosby became and were on February 6, 1866, the owners in fee of the N. ½ of lot 8 and the E. 20 feet of the N. ½ of lot 7, including the ground embraced in the 10-foot alley here in controversy. By deed dated November 20, 1867, and duly recorded, Isaac Crosby and wife conveyed to Samuel M. Nickerson all their right, title, and interest in and to the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7. By deed dated December 4, 1867, Samuel Nickerson and wife conveyed to Albert Crosby the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7. By deed dated March 12, 1873, which was duly recorded, Albert Crosby and wife conveyed to Charles Busby, for the consideration of $145,000 the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, all in block 37, "together with the right to use the private alley, ten feet in width, extending along the rear end of said premises, in common with the owners of other premises abutting on such alley." On March 12, 1873, Charles Busby executed to Charles Hitchcock a trust deed conveying the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, "together with the right to use the private alley, ten feet in width, extending along the rear end of said premises, in common with the owners of other premises abutting on said alley." On October 3, 1874, Charles Hitchcock executed to Marcus C. Stearns a trustee's deed, duly recorded, foreclosing the trust deed last mentioned, and conveying the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7 in block 37, "together with the right to use the private alley, ten feet in width, extending along the rear end of said premises, in common with the owners of the premises abutting on said alley." On October 22, 1874, by deed of that date, duly recorded, Charles Busby and wife conveyed to Marcus C. Stearns all their interest in the premises last above described, "together with the right to use the private alley, ten feet in width, extending along the rear end of said premises, in common with the owners of the other premises abutting on said alley." On February 1, 1875, Marcus C. Stearns and

wife conveyed to John G. Shortall the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, "together with the right to use the alley next west of said premises in common with the other owners of property, abutters upon said alley." On March 4, 1878, by deed of that date, duly recorded, John G. Shortall and wife conveyed to William A. Fuller the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, "together with the right to use the private alley, ten feet in width, extending along the rear end of said premises, in common with the owners of the other premises abutting on said alley." On January 3, 1880, by deed of that date duly recorded, William A. Fuller and wife, in consideration of $193,000, conveyed to the appellee, John Borden, the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, "together with the right to use the private alley, ten feet in width, extending along the rear end of said premises, in common with the other owners of the premises abutting on said alley; said premises hereby conveyed being about ninety-one and one-half feet on State street, and extending back westward of the width aforesaid to said private alley." On May 22, 1873, by deed of that date, duly recorded, Hibbard Porter and wife conveyed to Charles Busby the N. ½ of lot 8 in block 37; "also the following part of lot 7 in said block, to wit: The north ninety feet of the east twenty feet of said lot 7; it being all of said lot 7 conveyed to said Hibbard Porter by Hugh T. Dickey by deed recorded December 23, 1844; the west ten feet of said described parcel of said lot 7 being subject to an easement for private alley as expressed in said last-mentioned deed." By deed dated January 3, 1880, Charles Busby and wife conveyed to appellee, John Borden, the N. ½ of lot 8 and the N. ½ of the E. 20 feet in width of lot 7, "being subject to an easement for a private alley; the premises hereby conveyed fronting State street, in the city of Chicago, about ninety-one and a half feet, and extending back westward of the width aforesaid to and under said alley." By the will of Isaac Crosby, Samuel M. Nickerson was appointed executor and trustee, with power to sell and convey real estate, at his discretion. On November 11, 1898, Samuel M. Nickerson and wife executed a deed conveying to the appellee, John Borden, all their interest in the W. ½ of the E. ½ (being the W. 10 feet of the E. 20 feet) of the N. ½ of said lot 7, being the alley in the rear and lying west of and adjoining lot 10 in the assessor's division above described. On November 15, 1898, Samuel M. Nickerson, as executor and trustee under the will of Isaac Crosby, executed a deed conveying said alley, by the description last above set forth, to the appellee, John Borden.

The decree entered by the court in this cause on February 6, 1901, finds that the appellee is the owner in fee simple of the E. 20 feet in width of the N. ½ of said lot 7, subject to a private easement or way over the W. ½ of the said E. 20 feet in width of the N. ½ of said lot 7, as set forth in the said deed

of Hugh T. Dickey to Hibbard Porter; that appellee is the owner in fee simple and in the actual possession of the N. ½ of said lot 8 and of the E. 10 feet of the N. ½ of lot 7; that his said possession is by a building fronting on State street, and abutting in the rear upon the said private alley, and connecting with the area under the said alley; that, before filing the original and amended bills herein, the Western Methodist Book Concern commenced the construction of a modern, fireproof, high building upon the premises next to and adjoining the E. 20 feet of said lot 7; that, in excavating the basement, the south end of said alley way, to wit, the S. 39 feet, more or less, of the W. 10 feet of the said E. 20 feet, gave way, the materials thereof sliding into the said basement then being excavated by said Methodist Book Concern, so as to render said alley way impassable; that appellee proceeded to construct an area in that part of said alley way next south of the area already in use by him, having erected the walls thereof to grade, and having placed the steel beams or girders upon said walls, when the appellant interfered, and, by its officers, ordered him to cease work upon said area; that said city claims to be the owner of said W. 10 feet of said E. 20 feet of the N. ½ of said lot 7 in fee simple, and refused to permit appellee to complete said area, and the covering thereon, unless appellee would first agree to occupy the same as a tenant of the city, and pay a large annual rental therefor, etc. The decree finds, that neither the city nor the public has any interest whatever in said W. 10 feet of said E. 20 feet of the N. ½ of said lot 7, being the 10-foot alley here in controversy, but that the fee simple thereof, subject to said private easement therein, is vested in appellee. The decree then proceeds to perpetually enjoin the city from making any claim for such rent, and from making any claim to any right, title, or interest in said private way, etc.

Charles M. Walker, Corp. Counsel (Granville W. Browning, of counsel), for appellant.

Pence & Carpenter, for appellee.

MAGRUDER, J. (after stating the facts). The material question in this case is whether the alley 10 feet wide, as described in the statement preceding this opinion, to wit, the W. 10 feet of the E. 20 feet of the N. ½ of lot 7 in block 37, original town of Chicago, is a private alley or a public alley. If it is a private alley, then the decree of the court below was correct, in enjoining the city and its officers from interfering with its use by the abutting owners, as is set forth in the decree; but, if it is a public alley, then the decree of the court below was wrong.

1. Where a strip of land is reserved for an alley between the parties to a deed, or where, by the terms of the instrument creating the alley, the appropriation of the land embraced therein is for the use of particular persons only, the

alley is a private alley. Where there is a right of way, the use of which is confined to particualar persons, and to the owners of property abutting thereon, it is regarded as a private right of way. A private right of way serves as a means of accommodation to a limited neighborhood for local convenience. It has been defined to be "that right which one man has of going over another's land, and is confined either to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain." Garrison v. Rudd, 19 Ill. 558; Insurance Co. v. Littlefield, 67 Ill. 368; Carpenter v. Electric Co., 178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645; 2 Am. & Eng. Enc. Law (2d Ed.) p. 149. Where the term "alley" is used in a deed or in a plat, it will be taken to mean a private alley, where the word "private" is prefixed, or where the context requires that a different meaning than that of a public alley is to be assigned to the term. Elliott, Roads & S. (2d Ed.) § 24. It is also to be understood that an alley cannot be regarded as a public alley, so as to charge the local authorities with the duty of maintaining it, unless it has been legally established or accepted as such. Id. If the definitions thus given of a private alley be applied to the alley in controversy in this case, there can be no doubt that it is a private alley. By the terms of the original deed, made by Hugh T. Dickey, the owner and patentee of lot 7, on August 24, 1844, to Hibbard Porter, conveying the E. 20 feet of the N. ½ of lot 7, it was declared that "a strip ten feet wide by ninety feet deep, being the west one-half of the above-described premises, is to remain forever open and unobstructed as and for an alley for the free use and enjoyment of the owners and occupants of said lot 7 in block 37 in common with the owners and occupants of the other lots of land and premises lying upon said alley." Evidently it was the intention of the parties to this original deed to appropriate the right to use the alley, not to the public at large, but to particular persons, who were the owners and occupants of lot 7, and the owners and occupants of other lots abutting on said alley. The alley, having thus been appropriated to the use of particular persons, and not to the public at large, was a private alley. Nearly all the deeds subsequently made by parties holding under Dickey and Porter refer to the alley as a private alley, and as an alley, the right to use which was confined to the owners of the premises abutting thereon. These deeds, and the terms thereof, are set forth in the statement preceding this opinion, and further quotations therefrom need not be here made. It is true that the deed made by Uranus H. Crosby to Edward Aiken on December 26, 1865, and the deed made by Aiken to Samuel M. Nickerson and Isaac Crosby on February 6, 1866, conveyed the whole of lot 7, without specifically mentioning the alley in question. It is also true that the deed executed by Samuel M. Nickerson and wife to Albert Crosby on December

4, 1867, conveyed the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7, not specifically mentioning the N. ½ of the W. 10 feet of the E. 20 feet of said lot 7, being the alley in question. But the three deeds last mentioned were made subject to the easement in the alley created by Dickey's deed to Porter in favor of the abutting owners. The deed from Nickerson Albert Crosby recites that it is made subject "to the reservations and conditions of a certain release deed made by the Connecticut Mutual Life Insurance Company to Uranus H. Crosby." The release deed in question was introduced in evidence, and contains these words, "Excepting and reserving therefrom the alley laid out over the west half of the east quarter of said lot 7," showing that Nickerson recognized the existence of the alley, and the right of the abutting owners to use the alley. It was not essential to the enjoyment of the easement in the alley by the purchasers of the lots abutting thereon that the alley should have been mentioned in all their deeds, because incorporeal hereditaments, appendant or appurtenant to land, pass by conveyance of the land to which they are annexed, without mention of the appurtenances. "A private way, appendant or appurtenant to land conveyed, passes with the dominant estate, as an incident thereto." 19 Am. & Eng. Enc. Law (1st Ed.) p. 110; Clarke v. Gaffeney, 116 Ill. 362, 6 N. E. 689; Kuecken v. Voltz, 110 Ill. 264; Garrison v. Rudd, supra; Lide v. Hadley, 36 Ala. 627, 76 Am. Dec. 338. All the subsequent deeds, however, beginning with the deed executed by Albert Crosby and wife to Charles Busby on March 12, 1873, and concluding with the deeds executed by Nickerson individually and as trustee under the will of Isaac Crosby, on November 11 and 15, 1898, to the present appellee, not only refer to the alley as a private alley, but recognize the right of the owners of the property abutting thereon to use the same.

It is insisted, however, on the part of the appellant, that, although the alley was originally a private one, it was subsequently changed into and became a public alley. A public alley or a public highway may be established in three ways: (1) By condemnation in the mode prescribed by the statute; (2) by grant, which may be established by producing the deed making the grant, or by long-continued user for 20 years or more, implying a previous grant; and (3) by dedication, either expressed or implied, to the public use by the owner of the soil. Grube v. Nichols, 36 Ill. 92. It does not appear in this record that the alley here in controversy was ever condemned in any mode pointed out by the statute. No statutory plat was executed and filed by any of the owners of the property, designating the alley as an alley, either public or private. Nor can it be held that there ever was any common-law dedication of the alley as a public highway. The constant reference to the alley as a private alley by the various owners of the abutting property in their deeds negatives the

idea that there ever was any dedication of the alley, or offer to dedicate the same, as a public highway. "In order to constitute a dedication at common law, it is essential (1) that an intention on the part of the proprietor of the land to donate the same to the public use, and (2) an acceptance thereof by the public, be established by the evidence, and (3) that the proof as to these facts must be clear, satisfactory, and unequivocal." City of Chicago v. Chicago, R. I. & P. Ry. Co., 152 Ill. 561, 38 N. E. 768. Not only is it true that the intention originally was to make the alley in question a private alley, but it is also true that there is no clear, satisfactory, and unequivocal proof in this record of any subsequent intention on the part of the owners to donate the same to the public use. The vital and controlling principle in a common-law dedication is the animus donandi; and where there is no manifestation of intent on the part of the owner of the soil, either by formal declaration, or by such acts as should equitably estop him from denying such intention, to donate the land to the use of the public, it cannot be said that there is a valid dedication. Counsel for appellant say that the title to the alley remained in Nickerson, individually and as trustee under the will of Isaac Crosby, from July 6, 1866, until November, 1898, when it was conveyed by Nickerson to the appellee. But, while it is true that the title to the ground embraced in the alley was in Nickerson during the time mentioned, yet the title was so held subject to the right of the abutting owners to use the alley as a private alley. Nor did the fact that during that period Nickerson made no assertion of ownership to the ground embraced in the alley indicate any intention to dedicate it to the public. "A dedication is not an act of omission to assert a right, but it is the affirmative act of the donor, resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere nonassertion of a right does not establish a dedication, unless the circumstances establish the purpose or intention to donate the use to the public." City of Chicago v. Hill, 124 Ill. 646, 17 N. E. 46; Grube v. Nichols, supra; City of Chicago v. Chicago, R. I. & P. Ry. Co., supra. However, we understand counsel for appellant to concede in their reply brief that the city does not claim any right to the alley in question as a public alley upon the ground of dedication.

2. The contention of the appellant is that the city has acquired the right to the alley as a public alley by prescription; that is to say, that the city, by an alleged public user, and an alleged acquiescence of the owners in such public user, together with certain acts of control exercised over the alley, has acquired title thereto, or a right to use the same as a public alley. "In order to establish a way by prescription, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the

owner of the land in or over which the easement is claimed." City of Chicago v. Chicago, R. I. & P. Ry. Co., supra; Washb. Easem. 131; Toof v. City of Decatur, 19 Ill. App. 204; Daniels v. People, 21 Ill. 439. We discover in this record no evidence of any use of this alley by the public as a public alley during the period from 1866 to 1898. No witnesses testify that the alley was used for the purpose of passage and repassage by the public generally. The only use made of the alley as a highway, and for purposes of passage and repassage, was by the owners of the abutting property, and by persons having business with such owners. If there was any use of the alley, during the period named, by other persons, or by any portion of the public, it was merely a permissive use, and not under any claim of right on the part of the public. Where the use is by mere permission only, and not adverse, there is no basis upon which a right of way by prescription can rest. O'Connell v. Railroad Co., 184 Ill. 308, 56 N. E. 355. Where there has been user of a highway for a prescribed statutory period, a presumption arises from such user that there has been a grant of the highway. This presumption, however, may be rebutted by testimony. Grube v. Nichols, supra; Washb. Easem. pp. 104–108. Such presumption is rebutted in the case at bar by conclusive evidence that the grant made of the alley here in controversy was the grant of a private, and not of a public, alley. "A mere permissive use of a way laid out as a private alley will not of itself transform it into a public alley." Elliott, Roads & S. (2d Ed.) § 25. "A private way cannot be converted into a public highway by the use thereof by the public, no matter how long that use may be continued, but there must be a dedication and acceptance." 19 Am. & Eng. Enc. Law (1st Ed.) 107. The use of this alley will be presumed to have been in accordance with the intention of the owners, and the intention of the owners was to make it a private alley for the use of the abutting owners. In Insurance Co. v. Littlefield, supra, we said (page 373): "The use will be presumed to have been in accordance with the intention of the owner, and when the way is opened as a private passway, and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued." Hall v. McLeod, 2 Metc. (Ky.) 105, 74 Am. Dec. 400; Carpenter v. Gwynn, 35 Barb. 395; Dexter v. Tree, 117 Ill. 532, 6 N. E. 506; City of Chicago v. Chicago, R. I. & P. Ry. Co., supra; Lambe v. Manning, 171 Ill. 612, 49 N. E. 509; White v. Bradley, 66 Me. 258. In the latter case it was said: "A use which is simply permissive, however long continued, or the opening of a way as a private way, and subsequent use of it as such, whatever the length of such use by others, will not make it a public way; nor does it amount to the proof of a dedication." In Toof v. City of Decatur, supra, speaking of the rule that, to establish a highway by prescription, it must be shown that the use of it as

such has been public for 20 years, adverse, or under claim of right, uninterrupted, with the acquiescence, and yet without the agreement, of the owner of the land made within that period, it was said: "As a rule, however, the public use of it for that period as a highway, unexplained, will raise a presumption of the other conditions stated, and shift the burden of proof as to them. * * * An exception to this rule is recognized in the case of wild and uninclosed land. * * * Nor does it apply to an open way in a town or village, affirmatively shown to have been so made or left by the owner for his private use, though the public also may have used it without objection by him. * * * Nor where this object and purpose are manifest from the way itself, or its especial relation to his other premises." Washburne, in his work on Easements and Servitudes (2 Ed., p. 184), says: "And where a way is opened as a private way, and intended as such, and this can be shown, no length of use by others will make it a public way." In Shellhouse v. State, 110 Ind. 512, 11 N. E. 485, the supreme court of Indiana said: "Where the owners of land devote a portion of it for use as an alley or passageway for their own private purposes, such alley or passageway will not be converted into a public highway simply because the public also uses it by permission from the owners." The evidence here is not sufficient to show that the general public ever used this alley as a way of passage or repassage, or made any claim to it as a public alley. But, even if there were evidence of such use, it was merely permissive, and conferred no right, because, the way being a private way, such use could be prohibited or discontinued by the owners at their pleasure; and hence such use could not have the effect of converting the alley into a public highway, inasmuch as it was not adverse and exclusive and under claim of right, with knowledge and acquiescence of the owner. Dexter v. Tree, supra.

3. Counsel for appellant refer to certain circumstances which, as they claim, indicate such a public user of the alley in question by the city of Chicago as necessarily results in making it a public alley. One of the circumstances referred to is the making in 1863 of the assessor's plat or subdivision, and marking what is called an "alley" thereon, as indicated in the statement preceding this opinion. A strip of ground 10 feet in width is marked upon the map of this assessor's subdivision, open at the south end and closed at the north end; but there is nothing upon the face of the plat which indicates that this strip was regarded as a public alley, or as an alley of any kind. But, however this may be, the assessor, in making the plat, did not represent the city of Chicago or the public, and could not by any act of his create a highway. No such authority was conferred upon him. Hamilton v. Railroad Co., 124 Ill. 235, 15 N. E. 854. In the latter case we said (page 247, 124 Ill., page 858, 15 N. E.): "The assessment or nonassessment of the premises we do not regard as

material, as the assessing officers do not represent the public for the acceptance of dedications." None of the conveyances executed after the making of this plat in 1863 describe the property according to such assessor's plat, but they describe it according to the plat of the original town of Chicago, and such conveyances recognize the strip of ground as a private alley for the benefit of the adjoining owners. The fact that the property lying upon the alley has been assessed according to the assessor's division is immaterial, as affecting the rights of the adjoining owners to use the alley, or as indicating any acceptance thereof by the city. Hamilton v. Railroad Co., supra. The easement which the adjoining owners had in this alley could not be taken away from them either by the act of the assessor in not assessing the alley, or by the act of the owner of the ground embraced in the alley in not causing it to be assessed. This assessor's plat fails to designate any strips of land as public streets or highways. The owner of property might subdivide it in such way as to establish over it only private ways for the sole benefit of those who might become owners of the lots in the subdivision, and in which the public, as such, would have no interest, and over which the public would have no control. City of Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774.

Another circumstance, urged by counsel for appellant in favor of the public character of the alley is the fact that it was not only never assessed, but that no taxes were ever paid upon it, and it is claimed that these facts show it to have been the intention of the parties that it should be a public alley. The city or the public cannot become entitled to a man's property because no taxes are assessed against it, and because, by reason of such nonassessment, no taxes are paid by the owner. If this alley was subject to taxation, it was the duty of the public officers to assess the same, and enforce the payment of taxes upon it. In Insurance Co. v. Littlefield, supra, we said (page 372): "It matters not in what way the grantors from Lindsey down to appellants may have described the premises they conveyed, and as bounded by an alley. That does not bring the alley into existence as a public alley, nor does their saying so make it so. It is true, it was for years open to the public; but Arenz claimed it all the time (so his brother and executor testifies) as his property, and, though he may never have paid taxes upon it, his right is not lost thereby."

Another circumstance, relied upon by counsel for the appellant is the fact that in 1884 the city of Chicago levied a special assessment upon the property abutting upon this alley for its improvement as a highway, and the further fact that the amount of the assessment, to wit, $265.44, against lot 10 in said assessor's division or the N. ½ of lot 8 and the N. ½ of the E. 10 feet of lot 7 in block 37 in the original town of Chicago, which was owned by appellee, was paid by him. It is urged

that the assessment of the adjoining property for the improvement of the alley shows that it was a public, and not a private, highway. The owner of land used as a private alley cannot be deprived of the same by a proceeding upon the part of the city to levy special assessments upon the adjoining property for its improvement as a highway. Holmes v. Village of Hyde Park, 121 Ill. 128, 13 N. E. 540; Hunerberg v. Same, 130 Ill. 156, 22 N. E. 486; Boynton v. People, 159 Ill. 553, 42 N. E. 842; People v. Sass, 171 Ill. 357, 49 N. E. 501. In Holmes v. Village of Hyde Park, supra, we said: "The owner, or claimant of ownership, of the soil covered by the street, is not, as such merely, required to be made a party to the assessment proceedings, and manifestly could not, therefore, be concluded or materially affected in his rights by the judgment confirming the assessment." In the Holmes Case, property belonging to a private owner was specially assessed for the purpose of grading and paving a street, where the village had not acquired the soil or title to the street so paved, and the title to the street was in the adjoining property owner, who was assessed. In the case at bar, when the special assessment was levied, Nickerson and Isaac Crosby were the owners in fee of the alley, subject to the right of the adjoining owners to use the same. They were not made parties to the assessment proceeding, but, whether they were or not, they could not be concluded or materially affected in their rights by the judgment in the special assessment proceeding. The same is true as to parties whose property abuts upon the alley, and who had an easement in it for the purpose of passage over it. The title to the alley was not involved in the special assessment proceeding. In the cases last referred to, it was held that the fact that the property assessed was private property could not be set up as a valid objection against the confirmation of the special assessment against the adjoining property. If Nickerson and Crosby, the owners of the fee in the alley, had been made parties, they could not have made a defense against the special assessment upon the ground that they were the owners of the fee. This being so, the fact that they made no defense will not be considered against them, as evincing an intention to dedicate the alley as a highway. Appellee, Borden, was not a party to the special assessment proceeding, nor was his name mentioned upon the assessment roll; and hence the fact that he paid this assessment does not operate as a recognition on his part of the right of the public to the alley. He swears that he paid the assessment, of which he knew nothing until the bill for the amount thereof was presented to him, in order to save his property from sale, and not with the intention of making any dedication of it as a public alley. A city is not obliged to condemn property before levying a special assessment upon it for its improvement, upon the authority of the cases last above referred to. Of course, if the property sought to be improved is private prop-

perty, it cannot be taken by the city for public use without the payment of just compensation to the owner. The law gives the owner who is entitled to the possession of his property a remedy by action of ejectment for its recovery, if he is kept out of such possession by the tortious act of the city. The law affords the owner a proper remedy for his compensation. Hunerberg v. Village of Hyde Park, supra. It is to be noted, however, in regard to this special assessment proceeding, that it was a proceeding for the purpose of curbing, grading, and paving the alley running from Washington street to Randolph street between State and Dearborn streets. The alley sought to be paved was not merely the passway in controversy in this suit, but the longer alley, extending across the alley running east and west between State and Dearborn streets, and running north as far as Randolph street. In other words, the alley here in controversy was only a part of the alley which the city undertook to pave by virtue of the special assessment proceeding. It appears from the record that in that proceeding certain owners of property abutting upon the portion of the alley north of the east and west alley, and between the latter alley and Randolph street, filed objections to the confirmation of the assessment. Among these objections was the objection that the property on which the proposed improvement was to be made was private property, and not public property under the control and management of the city, and that said alley was a private alley, and had never been dedicated or platted as a public alley. By a stipulation entered into between the parties making this objection and the city, the city agreed that such objection should be sustained as to the property of the objectors. The city consented that a judgment should be entered sustaining the objection so filed, as to the property for which such objection was made. Thereby the city consented to the contention that a part of the alley sought to be paved was a private alley.

One or two other circumstances are referred to by counsel for appellant as indicating the use of the alley by the city as a public alley. It is claimed that shortly after the great fire of 1871, to wit, in 1873, the alley was graded by the city, but the evidence does not sustain this contention. Busby, who was then the owner of a portion of the property abutting upon the alley, and engaged as a contractor in erecting buildings upon other portions thereof, states that the basements under the buildings resting upon such property before the fire, and destroyed by the fire, were full of debris, and that, in excavating the basements for the new buildings, this debris was used wherever it could be used. He swears that he has no remembrance that the city filled the alley up to the new grade at that time. The appellant introduced no testimony to show that the grade was so filled by the city. Some other testimony was introduced, tending to show that the city paid for cleaning the alley after the year 1873; but the proof does not

show that the alley was actually so cleaned by the city, nor, if it was so cleaned by the city, how often or at what times,—whether once a week, or once a month, or once a year, or once in five years. The circumstances thus referred to might have the effect of showing an acceptance by the city of a dedication of the alley, if there had been any dedication thereof; but as there was no offer of a dedication by the owner of the fee of the alley, or by any of the owners of the adjoining property having easements in it, such circumstances did not tend to establish an acceptance of a dedication. There can be no acceptance of an offer where there is no offer. If a statutory plat, showing this alley upon it, had been executed and filed by the owner or owners of the property, or if a plat not executed according to the statute had been filed by the owners, or if the owners had made declarations or done acts indicating an intention to dedicate the property, then the circumstances referred to would be important, as showing whether or not the city accepted such dedication, or any offer of the same. But, as there is no evidence in the record of any user of the alley by the city or by the public for the purposes of passage and repassage, these circumstances, unaccompanied by such user, are not sufficient to establish ownership of the alley in the city, or to fix its character as a public alley. On the contrary, the testimony shows that the Methodist Book Concern and Busby, and the appellee himself, all of whom owned property abutting upon both sides of this alley between the years 1873 and 1898, made excavations under the alley for the purpose of storing coal and machinery and boilers for heating and lighting their buildings. These acts of possession on the part of the abutting owners were inconsistent with the possession and ownership of the soil under the alley by the city, and tended to show that there was no such adverse, continuous, and exclusive possession by the city as to create a title by prescription. Upon the whole, our conclusion is that the decree of the circuit court was correct, and accordingly that decree is affirmed. Decree affirmed.

BROWNE *et al. v.* CITY OF BOSTON *et al.*

(*Supreme Judicial Court of Massachusetts, Suffolk, June 18, 1901.*)

[60 N. E. Rep. 934.]

Limitation of Indebtedness*—Incurring Liabilities beyond Limit by Contract to Purchase Land—Injunction.—A municipal corporation, in order to purchase certain lands, the cost of which exceeded its debt-incurring power under St. 1885, c. 178, § 3, agreed with the owners that they should mortgage the land for the amount of the excess, and then should sell the equity in the land to the city, subject to the mortgages. The mortgages were not to mention the sale to the city, but provided

*See extensive note to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 725.

for payment by the mortgagors or their grantees. The deeds expressly stipulated that the city should not be liable for the amount of the mortgages: *held*, that such purchase would be enjoined, as, in order to keep the lands, the city would have to pay the mortgages, and hence, in effect, the purchase was beyond the debt-incurring power of the city.

Case reserved from supreme judicial court, Suffolk county; James M. Morton, Judge.

Petition by Causten Browne and others to restrain the city of Boston from purchasing, and Alfred T. Turner, treasurer, from paying for, certain lands. Case reserved. Injunction granted.

H. L. Harding and N. Matthews, for petitioners.

Geo. R. Nutter, John G. Palfrey, and Brandeis, Dunbar & Nutter, for defendant Geo. W. Seaverns.

Andrew J. Bailey, for defendant city.

Geo. R. Swasey and Wm. P. Thompson, for defendants Callahan and Costello.

MORTON, J. This is a petition under St. 1885, c. 178, § 3, and St. 1898, c. 490, by more than 10 taxable inhabitants of Boston, to restrain the city and its treasurer from purchasing and paying for certain parcels of land in said city, on the ground that the debt limit provided by St. 1885, c. 178, § 2, will be exceeded thereby. The case was heard on the petition, answer, and agreed facts, and reserved for the consideration of the full court. From the agreed facts it appears that the city of Boston owns certain premises, which are occupied and used as an insane hospital, and are under the control of a board of trustees. Prior to October 30, 1899, the trustees "requested the mayor * * * to make an appropriation to buy various parcels of land * * * for the purposes of the hospital, and among other parcels" the land in question. The mayor laid the communication, as provided by law, before the board of estimate and apportionment. St. 1898, c. 434, § 3. That board made an arrangement with the owners of the land "by which the city of Boston agreed to buy in the manner hereinafter described, and the owners to sell, said parcels for the following prices." Then follows a statement of the price per foot of each of the different parcels, amounting in all to $226,000. It was arranged with the owners of the land that they should mortgage the same to third parties for $202,000, payable, with interest, after three years from the conveyance to the city, with a privilege reserved in the mortgages to the owners, their grantees and assigns, to pay the mortgages and interest at maturity, or earlier if they should so desire. These mortgages were to be placed on the land before it was conveyed to the city, and it was arranged that the land should be conveyed subject to them, but that the city should not be mentioned in them, and that the deeds should contain the statement that the city was not to be held liable in any way for the payment of the mortgages, or the

interest thereon. The board of estimate passed an order appropriating $24,000 for the purchase of the equity in the land, and authorizing the city treasurer to issue from time to time bonds to that amount for that purpose, and directing the trustees of the insane hospital to expend the appropriation for that purpose. This order was duly submitted by the mayor to the city council, and passed by the board of aldermen and by the common council, and was approved by the mayor prior to December 12, 1899. None of the mortgages had been given or recorded at the time of filing this petition. The officers of the city propose to carry out the agreements that have been made for the purchase of the land, and on the delivery of the deeds the city is to take possession of the land. On October 30th, and since, the borrowing capacity of the city under the statutes limiting its indebtedness was and has been but little over $24,000. The assessed valuation of the land is $33,800, and the owners of it have been admitted as parties to this suit.

It is obvious that, if the arrangements which have been entered into between the city and the owners of the land are valid and binding, an easy method will be afforded by which cities and towns in this and similar cases can evade the statutes relating to municipal indebtedness. Without meaning to intimate whether it would stand any better if it were, the transaction does not seem to us to be in any just sense a letting and hiring, with a right of purchase. Nor does it constitute, we think, an agreement whereby the city acquires a buyer's option on the lands in question, even if we assume that a city or town may properly enter into such an arrangement. Neither do we think that the transaction can be regarded merely as the purchase of an equity of redemption, assuming that such a purchase is within the power of a city or town. What the parties contemplate, and manifestly intend, is a sale by the owners, and a purchase by the city, of the lands in question; and the arrangement which has been entered into has been made, it is plain, for the purpose of evading, if possible, the obstacle interposed by the statutes in regard to municipal indebtedness. It is expected and intended that the city shall ultimately pay the mortgages; otherwise the arrangement, so far as the owners are concerned, is a singular one. They receive $24,000 in cash, and they bind themselves to pay $202,000 on property which is assessed for $33,800. The transaction is, in substance and effect, a purchase of the lands by the city for the sum of $226,000, of which it pays $24,000 in cash, and is to pay the rest in three years, with interest, with the privilege of paying it sooner if it desires. It is true that no action could be maintained against the city for the balance of the purchase price, and that in that sense the city would not be indebted for such balance. But the property, when conveyed, will be subject to the mortgages that have been placed upon it pur-

suant to the arrangement that has been made, and the city either will have to pay them, or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers will ultimately be obliged to pay it as contemplated. In a sense, therefore, it might be said, if this arrangement were carried out, that the city would be indebted for the sums secured by the mortgages. Certainly, no account of its assets and liabilities would be correct which omitted this property from the one and the amount for which it was mortgaged from the other. Moreover, there is authority for the proposition that, if the city had itself mortgaged the property, and had stipulated in the mortgages that it should not be liable, but that the mortgagees should look to the land alone, such a transaction would be within the prohibition of the statute, and would not be upheld. Mayor, etc., v. Gill, 31 Md. 375; Earles v. Wells, 94 Wis. 285, 68 N. W. 964.

The object of the statute is to protect the taxpayer by confining the indebtedness of the city within a prescribed limit. The manner in which the indebtedness is created is immaterial, if the result is to subject the city to a present liability, direct or indirect, which the taxpayers eventually will be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think that the statute cannot be evaded in the manner proposed. See Ironwood Waterworks Co. v. City of Ironwood, 99 Mich. 454, 58 N. W. 371; Mayor, etc., v. Gill, supra; Newell v. People, 7 N. Y. 9; Reynolds v. City of Waterville, 92 Me. 292, 42 Atl. 553; Earles v. Wells, 94 Wis. 285, 68 N. W. 964. Decree for petitioners.

SULLIVAN *v.* CITY NAT. BANK OF DALLAS.

(Court of Civil Appeals of Texas, Nov. 2, 1901.)

[65 S. W. Rep. 39.]

Defective Sidewalk—Coal Hole—Personal Injuries—Measure of Abutting Owner's Duty to Person Injured.*—Where the owner of a building abutting on a city sidewalk has obtained permission from the city to repair the building and lower the sidewalk, and under such permission has erected barriers to close the walk to the public, the measure of the owner's duty to a person employed by another to make the repairs within the barriers must be determined by the common law, and not by a city ordinance requiring openings in the sidewalk to be properly covered.

Same—Reconstruction of Sidewalk—Negligence—Instruction.—In an action against the owner of a building for injuries sustained by falling into a coal hole in the sidewalk, plaintiff, who was employed to make repairs on the building, requested the court to charge that, if defendant obtained a permit to reconstruct the sidewalk, the defendant was bound to do the work without needlessly exposing others lawfully upon the sidewalk to injury, and "if by the negligence of

*See note at end of case.

the defendant in making the coal hole and leaving it open, if in fact it was left open, the defendant did not exercise due care to prevent injury to others lawfully upon the sidewalk," and if the plaintiff was injured by falling into the hole while lawfully upon the sidewalk and exercising due care, then the jury should find for the plaintiff: *held*, that the quoted clause of the instruction was calculated to mislead, and also assumed that defendant was negligent, and hence was properly refused.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by S. G. Sullivan against the City National Bank of Dallas. From a judgment for defendant, plaintiff brings error. Affirmed.

Crawford & Crawford, for appellant.

McCormick & Spence, for appellee.

RAINEY, C. J. Plaintiff in error sued to recover of defendant in error damages for injuries received by falling into an opening or coal hole in the sidewalk on Murphy street, in the city of Dallas. Defendant pleaded a general denial, and specially contributory negligence on the part of plaintiff in error. The cause was tried before a jury, and a verdict returned for the defendant. Judgment was entered accordingly, from which this writ of error is prosecuted.

Conclusions of Fact.

The bank owned and occupied a building at the corner of Main and Murphy streets, fronting on Main, and extending back along the line of Murphy street 100 feet. The bank maintained a cellar or opening under the sidewalk along Murphy street. Said opening had an outlet through the sidewalk on Murphy street, which was a circular hole, 18 inches or 2 feet in diameter. The covering for this hole was a cap weighing not more than 20 pounds. Just before the accident said building was damaged by fire to such an extent as to require it to be repaired, reconstructed in part, the sidewalk lowered, and the building painted. For this purpose the bank employed one Gill, and, acting for it, he employed contractors to do the work. Gill, on behalf of the bank, made a contract with one Brin to repair the building and lower the sidewalk. He also contracted with one Black to do the painting. For the purpose of lowering the sidewalk, the bank obtained permission of the city to do the work. At the time of the accident the work was being carried on, the old sidewalk had been torn up, and the new one was being laid. The opening was being reconstructed, which had been completed, except that the iron cylinder which was to receive the iron cap constituting the covering for the hole was not set, and could not be set until the sidewalk at said opening was ready for completion. At that time Brin's employees were using the opening, through which a hose was passed for the purpose of conveying water from a hydrant in the cellar to the street on the outside, and there used in the prep-

aration of mortar which was needed in repairing the building. The hole in the sidewalk was about 40 feet from Main street, and about 160 feet from Elm street. The sidewalks at the corner of Main and Murphy streets and at the corner of Elm and Murphy streets were barricaded, and there were barrels of cement and lumber and gravel which took up one-half of the width of Murphy street adjacent to the sidewalk, and said sidewalk along the entire length of said bank building was closed to the public. The painting of the building was being carried on at the same time the repairing of the building on the inside was being done. Plaintiff in error was employed by Black, and was doing the painting on the outside wall of said building. While so doing he descended the ladder which he was using for the purpose of going after material for the further prosecution of the work. After descending, and in going around the ladder, he fell into the hole and was injured. It was a clear, bright day, and said hole could have readily been seen by looking. The plaintiff in error knew that the sidewalk was torn up and being replaced, and that the work of repairing was being done. He was warned that morning by Black, his employer, to be careful, as the sidewalk was torn up.

The ordinances of the city of Dallas provide as follows:

"Art. 661. It shall be, and is hereby made, the duty of all the owners of property along any sidewalk to keep the same, together with the curbing and guttering, in good repair and free of obstructions of all kinds, except such as is permitted by this chapter. Any one failing to comply with this article, after three days' notice from the city engineer, shall be deemed guilty of a misdemeanor, and upon conviction in the city court shall be fined in a sum not exceeding fifty dollars; and each day any one thus fails shall be construed a separate offense. In case the city repairs any sidewalk, curbing or guttering the cost thereof shall be taxed up against the property and collected as other special taxes are collected."

"Art. 202. Whoever shall keep or leave open, or shall allow or suffer to be left or kept open, any cellar door, trapdoor, or the grating of any vault in or upon any sidewalk, street, thoroughfare or passageway, or whoever shall make, keep or maintain any uncovered opening in any sidewalk or footway, which it is his duty to maintain or repair, to become or continue so broken, uneven or out of repair as to endanger life or limb, shall be deemed guilty of a nuisance, and on conviction shall be fined not less than five dollars nor more than one hundred dollars.

"Art. 203. Whoever under lawful permission shall, for any purpose, dig or make any ditch, drain, excavation or hole in, across or under any street, sidewalk or other public place within this city, and shall not, with all reasonable dispatch, refill the same and fix such street, alley, sidewalk or place in as good condition as the same was when

found, shall be deemed guilty of a nuisance, and on conviction shall be fined not less than twenty dollars nor more than one hundred dollars.

"Art. 204. That it is hereby made unlawful for any person, persons, firm or corporation to make any excavation of whatsoever kind in the city of Dallas, whether the same be in or along or near any sidewalk, alley, or highway of any kind, without placing proper guard rails and signal lights or other warnings at, in or around the same, sufficient to warn the public of such excavation, and protect all persons using reasonable care from accidents on account of same. Any violation of this article shall be punished as provided by article 209 of this chapter."

"Art. 209. Any person violating any of the provisions of this chapter, to which no other penalty is provided, shall be fined in any sum not exceeding two hundred dollars for each offense."

Conclusions of Law.

1. Plaintiff in error complains of that portion of the court's charge which instructs the jury that the ordinance of the city of Dallas "did not apply so long as said sidewalk was not open at that point to travel by the public." Under the circumstances of this case, we are of the opinion that the court did not err in the particular complained of. The bank, as provided by the ordinances, had obtained from the city permission to make the repairs, and had erected barriers to close the sidewalk as a traveled way, and to warn the public of the situation. Plaintiff in error was working on the building within those barriers, and the measure of the bank's duty to him must be determined by the common law, and not by the ordinances of the city.

2. The court refused the following special charge requested by plaintiff, which action is complained of by plaintiff in error, to wit: "If you believe from the evidence that the defendant, through its agent, C. A. Gill, obtained a permit from the city of Dallas to reconstruct the sidewalk along Murphy street adjacent to the building owned and occupied by the defendant, then you are instructed that in doing the work necessary to reconstruct the sidewalk the defendant was bound to prosecute the work in such a way as not to needlessly expose others lawfully upon the sidewalk to injury; and if by the negligence of the defendant in making the coal hole and leaving the same open, if in fact it did leave it open, the defendant did not exercise due care to prevent the injury to others lawfully upon the sidewalk, and if you believe from the testimony that the plaintiff was injured by falling into the coal hole as alleged by him, and that at the time he received the injury he was lawfully upon the sidewalk, and was exercising due and reasonable care for his safety under all the circumstances, and was injured by falling into the coal hole while exercising due and proper care on his part, as hereto-

fore explained to you, then he would be entitled to recover, and you will find for the plaintiff." This charge is not correct. That part of it reading as follows, "and if by negligence of the defendant in making the coal hole and leaving the same open, if in fact it did leave it open, the defendant did not exercise due care to prevent injury to others lawfully upon the sidewalk," assumes that the defendant was negligent in making the coal hole and leaving it open, if same was left open. If it could be said that the latter part of said clause limited the term "negligence" to the exercise of due care, still it was calculated to mislead the jury, its meaning being contradictory and confusing. The charge of the court as to the care imposed by law upon defendant was sufficient, in the absence of a correct charge on that point being requested. There is no reversible error in the judgment, and it is affirmed. Affirmed.

NOTE.

Coal Hole—Abutting Owners—Independent Contractors.—In regard to the liability of abutting owners for injuries resulting from defective or open coal holes and area ways, Judge Dillon cites numerous authorities to sustain the following proposition: "No person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made in the sidewalk by the abutter, or by unsafe hatchways left therein, or by opening, or leaving open, an area way in the pavement, or by undermining the street or sidewalk or by placing unauthorized obstructions thereon, which make the use of the street unsafe or less secure, is guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom; and in such cases, the person who created or continues the nuisance is thus liable, irrespective of the question of negligence on his part." 2 Dill. Mun. Corp. (4th Ed.) § 1032. As a general statement of the law of the subject, the foregoing would probably pass unquestioned by all the courts; but as said by Mr. Justice Holmes in the case of Lorenzo *v.* Wirth, 170 Mass. 596, 40 L. R. A. 347: "There is great danger of being misled by these ready made generalizations, and of thinking only in phrases to which, as lawyers, the judges have become accustomed, instead of looking straight at things and regarding the facts in all their concreteness, as a jury would do. Too broadly generalized conceptions are a constant source of fallacy." In that case the coal hole causing the injury was just outside the line of a very narrow sidewalk, and at the time of the accident two employees of a coal company were actually engaged in shovelling into it a load of coal, which, when dumped from the cart, had rolled completely across the narrow walk and lay on all sides of the hole. The space in which the hole was situated between the sidewalk and the abutting building was paved with the same substance as the sidewalk, so that in effect it was, except for the hole in question, an unbroken continuance thereof, and a standing inducement to travelers to walk thereon. The person injured, as it appeared from the evidence, was a foreigner, who had never seen a coal hole and knew nothing of their use and purpose, and was injured while climbing from one side of the pile of coal to the other, not knowing that it surrounded a hole in the centre, though the workmen were actually engaged in shovelling in the coal at the time. It was held, two of the justices dissenting, that the abutting owner was not liable; that the doctrine of absolute liability, negligence or no negligence, did not apply to such a case;

Note

the court saying, in substance, that the facts were such as to warrant the defendant in assuming that the public were sufficiently warned, and that it was not incumbent upon the defendant to stand guard and to tell the public that they must not understand the continuity of the pavement under the coal, if they should happen to know of it, as a present assurance that they might step blindly into the coal and as a warranty that there was no coal hole in the place where the coal was pouring down.

The principal case, while not analogous to the foregoing, is much stronger on its facts. Consider for a moment that the purpose of the common-law doctrine of absolute liability of abutters maintaining areas, coal holes, or openings of any kind in sidewalks is the protection of the traveling public; and the ordinances quoted in the principal case were enacted with the same intent. Here the person injured was not a traveler, and manifestly could lay no claim to a recovery of damages on that ground. The only other ground upon which he could have brought an action against the abutting owner was that of master and servant, but even that fails here, for according to the admitted facts both he and the workmen engaged in reconstructing the sidewalk were employed by an independent contractor; and moreover, unless we adopt the "different department rule," he and the workmen engaged upon the sidewalk were fellow servants.

In Bibb's Adm'r *v.* N. & W. R. Co., 87 Va. 711, 14 S. E. Rep. 163, the plaintiff's decedent was in the employ of a bridge company, independent contractors, engaged by the railroad to replace a defective bridge with a new one without interfering with the running of trains during the progress of the work. The deceased was killed by the falling of a temporary span of the bridge, caused by the passage of a train while he was at work on it. In a most instructive opinion, reviewing and distinguishing a large number of cases, it was decided that the railway company was not liable—the replacing of the old bridge with the new without the stoppage of trains not being necessarily a hazardous or dangerous undertaking. See also, N. & W. Ry. Co. *v.* Stevens, 97 Va. 631, 34 S. E. Rep. 525, in which the railroad company was held not liable for the death of one of its own employees occurring under exactly similar circumstances.

A case similar to the principal case is that of Chicago *v.* Robbins, 67 U. S. (2 Black.) 418, 17 L. Ed. 298. There the city of Chicago was permitted to recover over against an abutting owner the amount of a verdict rendered against it in a suit by a traveler who had fallen into an area connected with a building which was being erected abutting on the sidewalk. True, the work there was being done by not only one, but, it seems, several independent contractors; but it is distinguishable from the principal case, however, in that the area was very deep, unguarded, and was otherwise a nuisance per se, concerning which the owner had received several notices and warnings from the city to abate, and that the person injured was a traveler; whereas, in the principal case, the owner had complied with all the requirements of the city, was proceeding with its permission, was himself guilty of no negligence, and the person injured was not a traveler, but the servant of an independent contractor, engaged, or at least associated with other workmen who were engaged, upon an undertaking not a nuisance nor intrinsically dangerous. Surely to hold the owner responsible under such circumstances would be to dispense with the doctrine of independent contractors altogether. See Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Pfau *v.* Williamson, 63 Ill. 16; Scammon *v.* Chicago, 25 Ill. 424, 79 Am. Dec. 334; Allen *v.* Willard, 57 Pa. 374; Moline *v.* McKinnie, 30 Ill. App. 419.

Of course, if the undertaking upon which the owner has set the independent contractor is in itself dangerous, unlawful, or a nuisance, the plea of independent contractor will not avail him as to third persons who are injured thereby. See Chicago *v.* Robbins, 67 U. S. (2 Black.) 418, 17 L. Ed. 298; Robbins *v.* Chicago, 71 U. S. (4 Wall.) 657, 18 L. Ed. 427; Motheny *v.* Wolffs, 2 Duvall 137; Homan *v.* Stanley,

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66 Pa. 464, 5 Am. Rep. 389; Ellis *v.* Sheffield Gas Con. Co., 2 El. & Bl. 767; Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Congreve *v.* Smith, 18 N. Y. 84, 72 Am. Dec. 495.

Upon the general subject of municipal and individual liability for injuries resulting from coal holes, areas, and excavations in sidewalks, see notes, 1 Mun. Corp. Cas. 13; 3 Mun. Corp. Cas. 33.

Dean *v.* City of Newcastle.

(Supreme Court of Pennsylvania, Nov. 8, 1901.)

[50 Atl. Rep. 310.]

Personal Injuries—Slipping on Ice—Contributory Negligence.—One is not necessarily guilty of contributory negligence, barring recovery for injury from slipping on icy sidewalk, though he could have seen the slippery place had he looked.

Appeal from court of common pleas, Lawrence county.

Action by B. F. Dean against the city of Newcastle for injury from slipping on icy sidewalk. According to the plaintiff's testimony, when he approached the place where the accident occurred he raised his eyes to speak to a friend, who was standing a few feet in front of him, and at that instant stepped on the ridge of ice, and fell. Judgment for plaintiff. Defendant appeals. Affirmed.

The specifications of error are as follows: "(1) The court below erred in refusing the defendant's fifth point, which was as follows: 'The undisputed evidence in this case being that the plaintiff could have seen the slippery place on the sidewalk had he looked, and that he did not look, he was therefore negligent, and cannot recover.' Answer. Refused. That is a matter of fact for the jury. (2) The court also erred in refusing the defendant's sixth point, which was as follows: 'That under all the evidence in this case the verdict should be for the defendant.' Answer. Refused."

Jas. A. Gardner, City Sol., D. B. Kurtz, and S. W. Dana, for appellant.

B. A. Winternitz, John G. McConahy, and John M. Gardner, for appellee.

PER CURIAM. The testimony required a submission of the case to the jury. It was for them to determine whether the testimony was sufficient to support the charge of negligence on the part of the city, and whether the plaintiff was clear of contributory negligence. There were 16 witnesses produced by the plaintiff, and many of them characterized the location where the plaintiff fell as dangerous. But three witnesses were produced by the city, one of which was a policeman, another was employed in connection with the fire department, and the other said that the sidewalks were very slippery. It was apparent from the testimony that the city failed to discharge its duties in the care of its streets and sidewalks. The want of this care and supervision showed the negligence of the city, and the accidents and injuries caused

by it. There was no contributory negligence on the part of the plaintiff, and no charge of negligence against the plaintiff which was warranted or justified by any evidence in the case. Our conclusion, therefore, is that the verdict of the jury should be sustained, and the judgment entered thereon should be affirmed. We therefore dismiss the specifications of error.

Judgment affirmed.

Brooks *v.* City of Sioux City.

(*Supreme Court of Iowa, Oct. 4, 1901.*)

[87 N. W. Rep. 682.]

Appeal—Insufficient Assignment of Error.—Where error is assigned on rulings in the introduction of evidence, and the reference to the page of the abstract on which the alleged ruling is shown is left blank, and there is no other sufficiently definite reference, the alleged errors will not be reviewed on appeal.

Evidence—Objections Interposed after Answers Given.—Where objections to questions asked on the trial were interposed after the answers had been given, it was not prejudicial error to allow the witness to complete his testimony on the subject.

Evidence—Testifying to Conclusion—Tweedledum and Tweedledee.—In an action against a city for injuries caused by an alleged defective sidewalk, it was proper to refuse evidence of plaintiff's witness that the walk was in bad condition, and yet admit evidence by the defendant that the walk was in good and sound condition, since to state that the walk was defective was to announce a conclusion, while to say that it was sound was to state a fact.

Same—Expert Testimony—Hypothetical Questions.—Hypothetical questions asked experts are not objectionable because they do not embody all the facts shown by the record.

Appeal from district court, Woodbury county; George W. Wakefield, Judge.

Action for personal injuries alleged to have been received by reason of a defective sidewalk. Judgment on verdict for defendant. Plaintiff appeals. Affirmed.

Bevington & Kennedy and A. H. Burton, for appellant.

F. E. Gill, for appellee.

McCLAIN, J. While there is a general assertion in appellant's argument that the instructions were erroneous, and that the verdict is without support in the evidence, the only assignments argued are those based on rulings in the introduction of evidence. Of these there are 59, in all of which, save 4, the reference to the page of the abstract on which the alleged ruling is shown is left blank, and there is no other sufficiently definite reference. The rulings which are sufficiently referred to are correct. The objections of appellant to the questions asked were interposed after the answers had been given. After the witness had thus been allowed, without proper objection, to open up the matter, it was certainly not prejudicial error to allow him to complete his testimony on the subject.

Without regard to the indefiniteness of the assignments, we may, perhaps, properly make the following suggestions as to the errors most strongly argued. A witness for plaintiff

was not allowed to say that the walk in question was, prior to the accident, in bad condition, while a witness for defendant was allowed to say that it was a good and sound walk, and the boards were good and sound boards. It seems to us plain that these rulings were correct. To state that the walk was defective was to announce a conclusion. The witness should have pointed out the condition which rendered it defective. But, on the other hand, to say that the walk was sound and in good condition was a statement of fact. It would be impossible for a witness to describe the absence of defects which constituted soundness and good condition. Many objections are made to hypothetical questions asked of expert medical witnesses, on the ground that they do not embody all the facts as shown by the record, but it is well settled that a hypothetical question is not improper simply because it includes only a part of the facts in the record. Rodg. Exp. Test (2d Ed.) § 65; Underh. Ev. § 273; Jones, Ev. § 373.

Affirmed.

City Council of Augusta *v.* Mackey.

(*Supreme Court of Georgia, March 26, 1901.*)

[38 S. E. Rep. 339.]

Defective Highway—Personal Injuries—Pipes and Waterworks beyond City Limits—Statute.—A municipal corporation which is invested with power to construct a system of waterworks for the benefit of the city beyond its corporate limits, to accomplish which it has been specifically authorized to lay mains and pipes under and across public highways, is liable to one injured by the negligent execution of the power granted. (a) Such liability attaches not only as to the laying of the pipes, but to the negligent removal of them as well. (b) The act which it is alleged was so negligently done as to injure the plaintiff was not ultra vires, and the petition set out a cause of action.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Joseph Mackey against the city council of Augusta. Judgment for plaintiff. Defendant brings error. Affirmed.

Wm. H. Barrett, for plaintiff in error.

F. W. Capers and Salem Dutcher, for defendant in error.

Stern *v.* Bensieck et al.

(*Supreme Court of Missouri, Division No. 2, March 12, 1901.*)

[61 S. W. Rep. 594.]

Defective Sidewalk—Personal Injuries—Degree of Care Required of Child.—In an action for injuries to plaintiff's minor son, sustained by reason of a defective sidewalk, it was error to instruct that the son was bound to exercise such reasonable care as a boy of his age, experience, and intelligence was "individually capable of," since the boy was bound to exercise only that degree of care which, under like circumstances, was reasonably to be expected of one of his years and capacity.

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Same—Proving Facts as Alleged—Pleading.—Where, in an action for injuries to plaintiff's minor son by reason of a defective sidewalk, plaintiff alleged that the planks and supports of the sidewalk were rotten, worn out, out of place, and warped so as to form a dangerous obstruction, the substance of the issue being merely that the sidewalk was defective, and formed an obstruction, plaintiff was not bound to prove all the facts as alleged.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Action by Abraham Stern against John C. Bensieck and the city of St. Louis. Judgment for defendants, and from an order granting plaintiff a new trial defendants appeal. Affirmed.

B. Schnurmacher and Chas. C. Allen, for appellants.

Morris Tucker and A. R. Taylor, for respondent.

GANTT, J. (after stating the facts). 1. It is insisted by plaintiff that the court properly set aside the verdict for the giving of said instruction No. 4, because it exacted the highest degree of care of which the boy was capable, whereas he was only required by the law of this state to exercise that ordinary care and prudence which, under like circumstances, could reasonably be expected of a boy of his years, capacity, and experience. We think the circuit court erred in said instruction. The instruction exacted the highest degree of care of which the boy was capable. He was capable of exercising the highest degree of care that a boy of his age and intelligence could exercise. An adult is only required to exercise that ordinary care in traveling along the streets of a city that a reasonably prudent person would observe under similar circumstances, not the highest care of which he is capable, and yet this instruction exacts more of a boy of tender years than is required of an adult. The rule is too well settled to admit of discussion. Municipal corporations are bound to keep their streets and highways free from obstructions, and reasonably safe for travel in the usual modes, and are liable for injuries caused by neglect to do so. Russell v. Inhabitants of Columbia, 74 Mo. 480; Loewer v. City of Sedalia, 77 Mo. 431; Franke v. City of St. Louis, 110 Mo. 516, 19 S. W. 938; Roe v. City of Kansas City, 100 Mo. 190, 13 S. W. 404. A child is not deemed negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Beach, Contrib. Neg. § 117; Burger v. Railroad Co., 112 Mo. 238, 20 S. W. 439; Williams v. Railroad Co., 96 Mo., loc. cit. 283, 9 S. W. 573.

2. The fifth instruction obtained by the city was erroneous. Plaintiff was not bound to prove all the defects he alleged. Counsel for the city concedes that, if the sidewalk was defective, either by being rotten or worn out, or because a plank was out of place in it, or a plank was so warped as to create an obstruction, with notice to the city, and plaintiff was injured by either, while exercising ordinary care on his part, he

would be entitled to recover; but insists that, because plaintiff alleged the walk was defective in all these respects, he must prove all, or he cannot recover. This is not tenable. It was only essential that he should prove the sidewalk was defective from either of these causes, with notice to the city thereof, and his resulting injury, to make out his case. Morrow v. Surber, 97 Mo., loc. cit. 161, 11 S. W. 48; Robertson v. Railroad, 152 Mo., loc. cit. 392, 53 S. W. 1082; Knox Co. v. Goggin, 105 Mo. 191, 16 S. W. 684. The substance of the issue was a defective sidewalk, and if plaintiff proved that fact either by showing it was rotten or was warped, of which the city had notice, and his son was injured thereby, he made out a case, and he was not required to prove all, or be defeated. As said by Sherwood, J., in Frederick v. Allgaier, 88 Mo. 604: "Although it is a fundamental rule of evidence that the evidence must correspond with the allegation, yet it is equally fundamental that it is sufficient if the substance of the issue be proved." "The fact that the answer was drawn too broadly did not require that defendant should be required to offer proof or submit to instructions as broad as the allegations of the answer." The circuit court, then, was not in error in holding it had committed error in giving the instruction. As to the point that the verdict was for the right party, we need only say that there was a sharp conflict of testimony, and in such case it is not our province to pass on the weight of evidence. The circuit judge awarded a new trial, and committed no error in so doing, and his judgment in so doing is affirmed. All concur.

Taylor *v.* City of Ballard.

(*Supreme Court of Washington, March 7, 1901.*)

[64 Pac. Rep. 143.]

Unsafe Street—Escaping Steam—Personal Injuries—Negligence.—Plaintiff was driving a gentle horse over defendant city's plank road at a point where pipes for the steam engines used in defendant's pumping station and electric light plant ran under the road, which was elevated from 3½ to 6 feet, and had no railing. Defendant's servants were in the habit of blowing off steam from the engines through these pipes, and as plaintiff was passing they allowed steam to escape so that it arose in clouds on both sides of the road, frightening plaintiff's horse so that he backed off the road and injured plaintiff: *held* sufficient to support a verdict against defendant on the ground that the road was not reasonably safe.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by W. G. Taylor against the city of Ballard. From a judgment for the plaintiff, defendant appeals. Affirmed.

Wilmon Tucker, Ivan L. Hyland, and John W. Peter, for appellant.

P. V. Davis and William A. Gilmore, for respondent.

It seems to us that the principal question in this case, viz. whether the city was responsible for the condition of the road

which was the cause of the injury, was decided by this court against appellant's contention in White v. City of Ballard, 19 Wash. 284, 53 Pac. 159, where the plaintiff recovered for an accident which befell her while driving in a buggy when the horse took fright from several bicycles on an eight-foot planking, causing it to back off of the planking to the depression below; there being no guard rail where the accident occurred. This court in that case said: "The question of negligent construction and condition of the street, upon these facts, was certainly one for the jury, and there is substantial evidence to sustain their deduction of such negligence. The bicyclists who occasioned the fright of the horse were not guilty of any negligence or wrong. It was, then, a question for the jury to determine whether the negligent condition of the street was the proximate cause of the injury. We are satisfied with the instructions of the superior court given to the jury upon the question of negligence. It would be of but little value to review the almost infinite number of cases upon this question. Streets must be so constructed that the ordinary horse, with the ordinary disposition, allowing for the ordinary incidents of caprice or fright, can be driven with reasonable safety on them." This language, if applied to the case under discussion, would work an affirmance of the judgment. The street or road in this instance, under the testimony of the plaintiff, at least, was not so constructed that the ordinary horse with the ordinary disposition—and it is shown that the horse which the plaintiff was driving was a gentle horse—could be driven with reasonable safety. The condition of things shown by the testimony in this case would frighten almost any horse. The noise of the power house, conjoined with the sputtering and hissing of the steam as it escaped from the pipes, would have a tendency to excite even a very gentle horse.

An examination of the testimony in the case and of the instructions given and refused convinces us that no error was committed in the trial of the cause. The judgment will therefore be affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

Williams *v.* Mayor, etc., of City of Nashville.

(*Supreme Court of Tennessee, Feb. 2, 1901.*)

[63 S. W. Rep. 231.]

Dangerous Premises—City Not Liable for Injuries Sustained by Licensee Falling into Quarry Owned by It.—Where a city owned a lot on which it maintained a rock quarry, and the public, without invitation from the city, crossed the lot at their convenience, and formed a path over it, and plaintiff, in trying to follow the path on a dark night, fell into an excavation and was injured, he cannot recover.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

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Action by one Williams against the mayor and city council of the city of Nashville. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Pitts & Meeks and H. C. Lassing, for appellant.

E. A. Price and K. T. McConnico, for appellees.

From the declaration in the present case, it is apparent the plaintiff was a stranger to the defendant. He was on the land of the latter without an invitation of any kind, and for his own convenience; and while it does appear that the way which he was using was also used at its pleasure by the public, this was only done by the passive acquiescence of the defendant. In such case it is well settled by adjudication in England and America that the party injured under such circumstances is a mere licensee, and he must bear the consequences of his own misfortune. Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772. This distinguishing principle was recognized in Clapp v. La Grill, 103 Tenn. 164, 52 S. W. 134, where will be found a full citation of cases. The judgment of the circuit court is affirmed.

Ziegler et al. *v.* City of Spokane.

(*Supreme Court of Washington, July 3, 1901.*)

[65 Pac. Rep. 752.]

Defective Sidewalk—Personal Injuries—Defendant's Liability—Question for the Jury.—The sidewalk where plaintiff fell was full of holes, caused by decay. Slushy snow fell the day before, and froze hard, making the walk very slippery. There was evidence from which it might be inferred that her fall was caused by the icy condition of the walk, and tending to show that she slipped into a hole in the walk: *held*, that it was not error to submit the question of defendant's liability to the jury.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by Maggie J. Ziegler and husband against the city of Spokane. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. G. Avery and F. M. Dudley, for appellant.

Sullivan, Nuzum & Nuzum and Graves & Graves, for respondents.

FULLERTON, J. This is an action for personal injuries received by respondent Maggie J. Ziegler from a fall upon the sidewalk of the appellant city. From a judgment in favor of the respondents the city appeals. The only error assigned is that the evidence was insufficient to justify the submission of the cause to the jury. The evidence tended to show that the sidewalk upon which the respondent fell was old, and worn out, full of holes, caused by the decay of the materials of which it was constructed, and in a generally unsafe condition for ordinary travel; that on the day preceding the accident a fall of snow occurred, which,

owing to the temperature, was wet and slushy; that during the night it froze hard, leaving the walk at the time of the accident in a very slippery condition. It is the contention of the appellant that the efficient and proximate cause of the injury to the respondent was the slippery condition of the walk, and that, under the circumstances shown, it is not liable therefor. While the testimony of the injured respondent herself is not clear as to the cause of the accident, and while it might be inferred from the testimony of other witnesses that the icy condition of the walk was a concurring cause, if not the proximate cause, of the fall which caused the injury, yet there was competent testimony on the part of the plaintiff tending to show that the respondent stepped into a hole in the walk, and that this was the cause of her fall and her consequent injury. It was thus for the jury to determine whether the mere slipperiness or the defective condition of the walk was the proximate cause of the accident, and it was not error on the part of the trial court to submit the question of the appellant's liability to them. The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

Paducah Ry. & Light Co. et al. *v.* Ledsinger.

(Court of Appeals of Kentucky, May 29, 1901.)

[63 S. W. Rep. 11.]

Defective Street—Abandoned Railway in Street—Personal Injuries—Negligence—Notice.—Where a street-railroad track which had been abandoned was covered with gravel, but the rails subsequently became exposed, whereby plaintiff was injured in driving along the street, the questions of negligence on the part of defendants, city and street-railway company, and of contributory negligence on the part of plaintiff, were for the jury; the defect in the street having existed so long that defendants were chargeable with notice thereof.

Contributory Negligence—Instructions.—As the court instructed the jury as to contributory negligence, defendants cannot complain of the court's refusal to further instruct the jury that if plaintiff drove on the right side of the street, when the left side was the usual and nearer and safer route to travel, they should find for defendants.

Appeal from circuit court, McCracken county.

"Not to be officially reported."

Action by Boss Ledsinger against the Paducah Railway & Light Company and the city of Paducah to recover damages for personal injuries. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry Burnett and R. T. Lightfoot, for appellants.

John G. Miller, for appellee.

HOBSON, J. Some years ago the Paducah Street-Railway Company laid down a track on Sixth street, in Paducah. This track it afterwards abandoned. The trolley wires were taken down and the track covered with gravel; but, either from an insufficiency of gravel, or the wear of the street, the rails became exposed, and, while driving down the street in

what is called a "drummer wagon," appellee, Boss Ledsinger, by reason of the exposure of the rails, was thrown from the wagon and injured in his knee. For this he filed suit against the street-railway company and the city, charging that the street was in a dangerous condition, and had been allowed by the defendants to remain in this condition for a long time, with knowledge of the danger, and that by reason of it his wagon had been overturned and he had received serious injuries, damaging him in the sum of $2,000. The defendants denied the allegations of the petition, and pleaded contributory negligence on the part of the plaintiff. The case was tried before a jury, who found for the plaintiff, and fixed the damages at $200.

While the evidence is conflicting, it was sufficient to warrant the submission of the case to the jury, and their finding is not so against the evidence that it can be disturbed by this court. The instructions fairly submitted the issue to the jury. The defect in the street had existed so long that the defendants were chargeable with notice of it. The amount of the verdict is reasonable, considering the injury sustained by plaintiff. The chief point relied on is that the court refused to instruct the jury that if the plaintiff drove on the right-hand side of the street, when the left side was the usual and nearer and safer route to travel, they should find for the defendants. This instruction was properly refused, as the court had given a very clear instruction on contributory negligence, and the matter referred to was only a circumstance from which the jury might have inferred negligence on his part, and was to be considered by the jury, in connection with the other facts in the case, on the question of contributory negligence, under the general instructions. Judgment affirmed.

Parker *v.* City of Ottumwa.

(*Supreme Court of Iowa, April 13, 1901.*)

[85 N. W. Rep. 805.]

Defective Sidewalk—Notice—Evidence.—Where a petition alleged that defendant had notice of the unsafe condition of the walk on which plaintiff was injured long before and at the time of the accident, evidence was admissible to show its unsafe condition prior to the accident.

Evidence—Objections.—An objection to a question after the answer is in is too late to be available.

Same—Same—Exception Not Taken.—Where there was no exception to the court's ruling on the admissibility of evidence, an objection to the ruling will not be considered.

Same—Admissibility.—Where defendant in an action for injuries occasioned by a defective sidewalk offered evidence tending to show that the walk was in good repair before, at, and after the accident, it was competent to show in rebuttal that repairs were made near the place in question after the accident.

Same—Admissibility of Evidence to Show Special Damage.—Where plaintiff's knee was injured by a defective sidewalk, and the petition alleged that the injury caused great pain and suffering, evidence that

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she was pregnant when injured, and that the labor of childbirth necessitated the movement of the injured knee, and consequent pain, was admissible, without an averment of special damages because of her pregnancy.

Appeal from district court, Wapello county; Robert Sloan, Judge.

Plaintiff was tripped and thrown by a loose board in defendant's sidewalk, and brings this action to recover damages for the injury received. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

W. H. C. Jaques, for appellant.

Steck & Smith, for appellee.

SHERWIN, J. The petition alleges that the defendant had both actual and constructive notice of the unsafe condition of its walk at the place where the plaintiff was injured long before and at the time the accident happened. Witnesses were permitted to testify as to this condition, and of this the defendant complains. It does not appear that an exception was taken to the ruling of the court on the motion to strike the answer of the witness Graham, but, regardless of this, the evidence was properly received. Smith v. City of Des Moines, 84 Iowa, 685, 51 N. W. 77; Hunt v. City of Dubuque, 96 Iowa, 314, 65 N. W. 319; Wilberding v. City of Dubuque (Iowa) 82 N. W. 957.

A witness for the plaintiff on his examination in chief was asked whether he had noticed repairs in the sidewalk before or after the accident. He answered that he had "seen where they took pieces and nailed them down." The question was then objected to, and the objection overruled. The witness then went on and answered where he had seen the repairs, and that it was after the accident. A similar objection was made after the answer was in, which was overruled, but no exception taken to the ruling. An objection to a question after the answer is in is ordinarily too late, and is of no avail. Leipird v. Stotler, 97 Iowa, 169, 66 N. W. 150. The answer to the first question did not specifically disclose when the repairs were noticed by the witness. When he answered afterwards that it was after the accident, no exception was taken to the ruling of the court thereon; hence we cannot consider it.

The defendant offered evidence tending to show that the sidewalk was in good repair before, at, and after the time of plaintiff's injury. In rebuttal the plaintiff was permitted to prove that repairs had been made at and near the place in question after the accident. This evidence was clearly competent, as tending to refute the defendant's claim. There was also evidence tending to show that the walk had been in an unsafe condition long before the plaintiff was hurt, and continued so for some time thereafter.

Plaintiff's attending physician was permitted to testify that

she was pregnant when injured, and that the labor of childbirth necessitated movement of the injured knee, and consequent pain. It is urged that this evidence should not have been received, because no special damage on account of pregnancy was pleaded. This was not necessary. It was alleged that the injury caused great pain and suffering, and her physical condition at the time thereof was proper for the jury to consider in determining its extent.

Lastly it is said the verdict is not supported by the evidence. With this we cannot agree. The evidence is in conflict on all material matters, except, perhaps, the question of the defendant's knowledge that the walk in question needed constant supervision and repair, and this is clearly shown by even its own witnesses. The judgment is affirmed. Affirmed.

Burns *v.* City of Emporia.

(*Supreme Court of Kansas, June 8, 1901.*)

[65 Pac. Rep. 260.]

Personal Injuries—Defective Street—Live Wires—Notice—Question for Jury.—Whether a public street in a city, rendered unsafe for travel by the falling of an electric wire, has remained in such condition a sufficient length of time to charge the city with constructive notice of its unsafe condition, or whether the city has actual notice of the unsafe condition of the same, and might with reasonable diligence after the receipt of such notice have repaired the same and averted an alleged injury occasioned thereby, is a question of fact for the jury, not a question of law for the court.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by Sarah Burns against the city of Emporia. Judgment for defendant. Plaintiff brings error. Reversed.

Madden Bros., for plaintiff in error.

Buck & Spencer, for defendant in error.

POLLOCK, J. This is an action brought to recover damages for personal injury alleged to have been sustained by plaintiff, occasioned by the falling of an electric wire at the corner of Rural street and Eleventh avenue, in defendant city. The plaintiff was driving a family horse, alleged to be gentle and quiet, drawing a carriage in which plaintiff, her daughter, and four children were riding. The horse, becoming entangled in this fallen wire, became frightened, and reared and plunged, throwing the plaintiff from the carriage, causing the injury complained of. The injury occurred about 7 o'clock in the evening. There was evidence that the mayor and a member of the council were notified of this wire being down. There was also evidence that this wire was down on the day before the injury occurred. Upon the trial the jury returned a verdict for defendant. Plaintiff brings error.

The sole question presented for our determination arises upon the instructions of the court, and particularly instructions

4, 12, and 13. In instruction 4 the court charged the jury as follows: "But, if such wire was down only for one day prior to the alleged injury, this would not be long enough to charge and bind the city with implied notice; and unless you find from the evidence that the city had actual notice or implied notice of the fact of such wire being down, in a dangerous condition, then you cannot find for the plaintiff." Instruction 12 contains the following language: "If the city did not learn of the wire in question being out of repair until four o'clock, or after, in the evening, it would not be negligence in the city to delay repairing said wire until next morning." In instruction 13 it is said: "If you believe the wire in question was in place and working condition at noon of the day of the alleged injury, and thereafter, and some time prior to the time of the alleged injury, for some cause fell to the ground, this would not be enough to charge or bind the city with implied notice of the condition of such wire as charged by the plaintiff. And if you believe from the evidence that such wire was in place and in working condition at noon, or thereafter, of the day of the alleged injury, and the city had no notice or knowledge until noon, or thereafter, of the day of the alleged injury that said wire was down, then the city did not have constructive notice of the condition of such wire; and you will then inquire as to the actual notice, if any, the city had." Counsel for plaintiff in error contend that these instructions invade the province of the jury, and are misleading and prejudicial to the plaintiff. We agree with the contention of plaintiff in error in this respect. It is the duty of a city to keep its streets reasonably safe for public travel thereon at all times, day and night. It was the province of the jury, not the court, to determine whether the officers of the city had notice, either actual or constructive, of the condition of this wire for a sufficient length of time to have permitted the same being repaired before the injury occurred. And it was not the province of the court to fix any definite length of time at which the officers of the city must have had notice of the fallen condition of this wire prior to the injury to plaintiff, in order to render the city liable. There are statutory provisions in certain states charging the city with knowledge of a defect in its streets which has existed for a period of 24 hours prior to the time the injury occurred. Monies v. City of Linn, 121 Mass. 442; Hanscom v. City of Boston, 141 Mass. 247, 5 N. E. 249; Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166. No such statutory provisions, however, exist in this state, and decisions based upon such statutory provisions have no application to the case at bar. The instructions given were both erroneous and prejudicial to the rights of plaintiff, and the judgment must therefore be reversed. It is so ordered. All the justices concurring.

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Rogers *v.* City of Williamsport.

(*Supreme Court of Pennsylvania, May 27, 1901.*)

[49 Atl. Rep. 293.]

Personal Injuries—Defective Sidewalk—Notice.—A city is not liable for injury from a defective sidewalk, it not having had actual notice of the defect, and there being no evidence from which constructive notice could be inferred, the sidewalk having been repaired 18 days before the accident, and there being no evidence as to when it again got out of repair.

Appeal from court of common pleas, Lycoming county.

Action by Robert Rogers against the city of Williamsport. Judgment for defendant. Plaintiff appeals. Affirmed.

W. H. Spencer and Clarence L. Peaslee, for appellant.

John J. Reardon and T. M. B. Hicks, for appellee.

PER CURIAM. This suit was brought to recover damages for injuries received by a fall upon a sidewalk in the city of Williamsport. On the trial of the case, and at the close of the evidence on which the plaintiff relied for a recovery of damages for injuries received by his fall, the defendant's counsel moved for a compulsory nonsuit, which was allowed by the court. It clearly appears in the opinion of the court refusing to take off the nonsuit that the city was not in any sense responsible for the plaintiff's fall. It was plainly stated in said opinion that it was not alleged that the defendant had actual notice of the displacement of the plank which caused the accident, and that there was no evidence from which constructive notice could be inferred. The result was an affirmance of the nonsuit, and an appeal by the plaintiff to this court. A careful reading of the testimony in the case shows that the conclusion of the court was completely warranted by it. The uncontradicted evidence was that the city, through its officials, notified the property owner to repair the sidewalk; that the notice was served upon him in July or August, and the sidewalk was repaired on the 12th of September, or 18 days prior to the plaintiff's fall. There was no actual or constructive notice of nonrepair during that period. No negligence was properly imputed to the city, and there was some evidence tending to establish contributory negligence on the part of the plaintiff. Judgment affirmed.

Stainback *v.* Mayor, etc., of City of Meridian.

(*Supreme Court of Mississippi, Nov. 26, 1900.*)

[28 So. Rep. 947.]

Failure to Replace Bridge—Personal Injuries—Sufficiency of Declaration.—A declaration in an action against a city alleged that a bridge over a ditch in a thickly-inhabited portion of the city, which was used by the public and by school children, was removed, and the ditch widened, and dug to the depth of 10 or 12 feet, and that the city failed to replace the bridge, but negligently placed one or two planks,

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8 or 10 inches wide, over the ditch, without fastening the ends thereof, and that, after it had remained in such condition for six months, the plaintiff, who was a minor, without knowledge of the danger, fell to the bottom of the ditch, and received severe injuries by a plank turning while she was crossing on her way to school: *held*, that the declaration stated a cause of action, and was not demurrable for want of facts showing negligence of the city.

WHITFIELD, C. J. If the evidence shall sustain the allegations of the declaration, the plaintiff is entitled to recover. The declaration states a good cause of action, and the demurrer admitting it should have been overruled. The case stated called for proof, not a demurrer. Reversed and remanded.

Mayor, etc., of City of Meridian *v.* Stainback.

(*Supreme Court of Mississippi, Oct. 21, 1901.*)

[30 So. Rep. 607.]

Personal Injuries—Ditch in Street—Contributory Negligence.—Where planks were placed over a ditch in a street for the convenience of the city employees in hauling rocks across the ditch, and barricades were erected to warn the public of the danger of crossing, one passing the barricades and sustaining injuries by the giving way of the planks while crossing them cannot recover from the city.

Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

S. A. Witherspoon, for appellant.

C. C. Miller, for appellee.

WHITFIELD, C. J. Without detailed analysis of the instructions, we feel constrained to say that on the evidence in this case the verdict should have been for the defendant. The basis of appellee's claim was that the planks had been put there as and for a passageway for pedestrians. There is no proof to support this allegation. It is clearly shown that barricades were put across the street to warn the public of the danger of crossing, and that these planks were put across for the convenience of the city employees in hauling rocks across the ditch. It would seem that the school children—one of whom says it was very dangerous to cross—went in between the barricades and the ditch, and thus across on the planks. If one chose, in spite of the barricades, and the warning they spoke, to take the risk of crossing, the city cannot be held for the consequences of such rashness. The reasoning that, though the city did not originally lay the planks down as a crossing for pedestrians, yet if persons wrongfully crossed on them, and the city knew of this wrongful crossing, and its constant repetition, and did not object, it is bound, is not sound. Repetition of an unlawful act, resulting in damage, cannot confer a right of action because of such damage. Besides, that is not the case made by the declaration. Unless on proper amendments, and very different proof, a good case can be made out, the suit must fail.

Reversed and remanded.

TERRAL, J., takes no part in this case.

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City of Columbus *v.* Griggs.

(*Supreme Court of Georgia, May 24, 1901.*)

[38 S. E. Rep. 953.]

Personal Injuries—Defective Streets—Contributory Negligence.—One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence.

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by W. H. Griggs against the city of Columbus. Judgment for plaintiff. Defendant brings error. Reversed.

Francis D. Peabody and L. F. Garrard, for plaintiff in error.

McNeil & Levy, for defendant in error.

Granting that the negligence of the city was fully established, it is certainly true that Dr. Griggs and his companion were wanting in ordinary care and diligence. They both knowingly and deliberately took a risk the danger of which, to any person of common prudence, would have been plain and obvious. It further appeared that they did so without excuse; for there was no emergency constraining them to travel over the dangerous place, and they had the choice of other routes to their destination, some of which were perfectly safe, and any one of which was, under the circumstances, unquestionably safer than that which they chose. The law by which this case should be controlled was fully discussed by the writer in Samples v. City of Atlanta, 95 Ga. 110, 22 S. E. 135. It is, in substance, that a traveler exercising due care may, although he knows there is some danger in driving over a defective portion of a street which a city had negligently failed to put in safe condition, recover for injuries thus sustained, unless the danger is obviously of such a character that driving over the place in question, in and of itself, amounts to a want of ordinary care and diligence. Certainly a man cannot heedlessly rush into grave peril, of the existence of which he is perfectly aware, and then hold any one else, whether negligent or not, responsible for the consequences. The court below ought to have granted a new trial on the ground that the verdict was not warranted by the evidence. Judgment reversed.

All the justices concurring.

Lenich *v.* Beaver et al.

(*Supreme Court of Pennsylvania, May 27, 1901.*)

[49 Atl. Rep. 220.]

Sidewalk—Excavation by Abutting Owner—Personal Injuries—Liability of Abutter.—Defendants' testatrix was the owner of land along which the city required her to lay a sidewalk. An excavation was

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accordingly dug, some 12 to 15 inches in depth, sloping downward to that extent in a distance of from 3 to 5 feet. Plaintiff's witnesses testified that in the evening they placed two stakes, in the form of an X, at each end of the excavation, and laid a board 1 inch thick, and about 6 feet long and 6 inches wide, across them. No light was left there. There was testimony as to the entire absence of barriers, but two of plaintiff's witnesses admitted that barriers were erected. It appeared probable from the testimony that they were afterwards removed. Plaintiff, while going to his polling place at 6:45 p. m. on November 8th, fell into the excavation and was injured: *held*, that a verdict for plaintiff would not be disturbed.

Appeal from court of common pleas, Lebanon county.

Action for personal injuries by William Lenich against C. Grove Beaver and others, executors of Anna Beaver, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

Lee L. Grumbine and Howard C. Shirk, for appellants.

George B. Woomer, for appellee.

PER CURIAM. The plaintiff alleged that he received serious injury through the negligence of the defendants. The evidence presented on the trial related to questions of fact which were for the determination of the jury. The instructions which the jury received from the court in its general charge, together with its answers to the defendants' points, were impartial and free from error. It was shown by the verdict of the jury that the plaintiff's allegation of negligence was sustained by the evidence, and that there was no negligence on the part of the plaintiff which contributed to the injury he received. As there is therefore no cause for reversal of the judgment, the assignments of error are dismissed. Judgment affirmed.

Hart *v.* Mayor, etc., of City of Union City.

(*Supreme Court of Tennessee, June 15, 1901.*)

[64 S. W. Rep. 6.]

Personal Injuries—Death of Policeman—Evidence.—Plaintiff's husband, a night policeman, was found dead on the floor of the city calaboose, with nothing to positively indicate the cause of his death. He had complained of heart trouble, and there were two small burns on one of his hands. The evening before he had obtained a new globe for the electric drop cord in the station house, which was found in his pocket after his death. The drop cord carried only a limited number of volts, not dangerous to a well man. There was a primary line of wire near the other, which, if crossed with the drop cord, would convey the current of both to one touching the drop cord. There had been disturbances during the day on the wires on the same short line with the calaboose, but it was shown by experiments made after deceased was found that there was no crossing of the wires, or anything else which would make them dangerous: *held*, in an action against the city for his death, that any presumption as to the cause of death from the position of the body was overcome by the proof that the wires were in good condition.

Error to circuit court, Obion county; W. H. Swiggart, Judge.

Action by Sallie Hart against the mayor and aldermen of

Union City. From a judgment dismissing the action, plaintiff brings error. Affirmed.

Yandall Haun and Waddell & Waddell, for plaintiff in error.
Moore & Wells, for defendant in error.

Without going at length into the evidential facts in the case, we are satisfied plaintiff has not been able to make out her case. Indeed, we are not able to see that she has even established a prima facie case. On the other hand, the city has shown that at the time of the death there was nothing the matter with the electric light lines that would make them dangerous. This is shown by testimony of the superintendent and engineer, by their experiments made immediately after the deceased was found, and by the physical facts which they recite, and numerous details which are given and which we think show affirmatively that the plant was in safe working order, and the death was not shown to have been the result of defects in the construction or operation of the plant. It may be that the death was caused by such a condition of affairs, but we think the plaintiff has not been able to show it; and the court cannot presume it because that would be a reasonable explanation of the death, especially when there is another equally as reasonable and plausible,—that is, death from heart failure. We think that the examinations made of the plant and wires and circuits immediately after the death were sufficient to overturn any prima facie case, if one had been made out, which we do not think was done. The nearest approach plaintiff is able to make towards showing defects in the line is the fact that there was a disturbance at Crossneus' fruit stand, which was on a short circuit between the transformer and the station house. But several persons received shocks from the wire at Crossneus' and were not injured, and the conditions at that place (the light being out of doors, and persons touching it being on the ground) made that more dangerous than the light in the station house. In addition, it is shown that the transformer was in good condition, and there is not only no proof to show how the primary current could get on the secondary circuit, but the evidence clearly demonstrates that, as a fact, it did not and could not do so. If, therefore, a presumption could arise from the position in which the body was found that death was caused by the electric wire, that presumption is overthrown by proof that the wires were in good condition, and that no defect existed. Plaintiff's counsel has made a very able and ingenious argument to sustain his theory, and has shown a thorough knowledge of electrical conditions and phenomena; but he fails at the threshold to show any contact with the wire or any disturbed or improper condition of the wires, and is met by the positive proof of the city showing the perfect condition of the plant, and the improbability, if not impossibility, of the death being caused by an electric discharge. The judgment of the court below is affirmed, with costs.

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Jordan *v.* City of Seattle.

(Supreme Court of Washington, Sept. 5, 1901.)

[66 Pac. Rep. 114.]

Defective Sidewalk—Personal Injuries—Contributory Negligence—Question for the Jury.—Plaintiff was injured by falling into a hole in the sidewalk over which she was passing after dark. Just before the fall she cautioned her children, who were with her, to look out for the hole. The walk was in daily use by others before and after the accident. The size of the hole was not disclosed, other than it was a broken plank, and neither was the width of the walk proved, nor was it shown whether plaintiff could with safety pass around it or step over it. Plaintiff knew of the hole, and could have avoided any accident by taking the sidewalk on the opposite side of the street: *held*, that the direction of a nonsuit was improper, as plaintiff's negligence was a question of fact for the jury.

Appeal from superior court, King county; W. R. Bell, Judge.

Action by Margaret Jordan against the city of Seattle. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. P. Ball and I. D. McCutcheon, for appellant.

W. E. Humphrey and Edward Von Tobel, for respondent.

The law is well settled that knowledge of a defect in the sidewalk, by the person injured, before he goes upon the same, or before the injury, does not per se establish negligence upon his part. Village of Clayton v. Brooks, 150 Ill. 105, 37 N. E. 574; Samples v. City of Atlanta, 95 Ga. 110, 22 S. E. 135; Sias v. Village of Reed City (Mich.) 61 N. W. 502; Lowell v. Watertown Tp., 58 Mich. 568, 25 N. W. 517; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298; Kelley v. Town of Fond du Lac, 31 Wis. 179; Nichols v. Town of Laurens, 96 Iowa, 388, 65 N. W. 335; Mayor, etc., v. Holmes, 39 Md. 243; Evans v. City of Utica, 69 N. Y. 166, 25 Am. Rep. 165; Millcreek Tp. v. Perry (Pa. Sup.) 12 Atl. 149. Exposing one's self to possible injury with knowledge of the danger is evidence of negligence as a matter of fact. "Therefore," says the supreme court of Illinois, "if a person attempts to pass over a sidewalk, bridge, or other structure, knowing the same to be in a dangerous condition, and in such attempt receives injury, his knowledge of the danger will presumptively establish contributory negligence. But such presumption is not conclusive. It is disputable, and may be rebutted by evidence of the exercise of ordinary care under the circumstances of the particular case." Village of Clayton v. Brooks, supra. If the danger arising from the known defect is obviously of such character that no person, in the exercise of ordinary prudence, would attempt to pass over the sidewalk at that point, or over a particular part thereof, or, in other words, if such attempt would, of itself, plainly and unequivocally amount to a want of ordinary care and prudence, it may be so decided as a matter of law. Samples v. City of Atlanta, supra.

We cannot say, from the facts in this case as disclosed by the record, that the plaintiff was reckless, or disregarded the dictates of ordinary prudence and discretion. Unless a court can so determine without doubt or hesitation, it is its duty to leave such questions for the jury. If the sidewalk on the side of the street where the injury occurred could be used with ordinary care, the plaintiff was not under obligation to seek a better walk. Nichols v. Town of Laurens, 96 Iowa, 388, 65 N. W. 335; Lyons v. City of Red Wing (Minn.) 78 N. W. 868. It is only in cases where the danger in the walk is obvious, and of such a character that a prudent person would not use it, that another route, if convenient, must be sought for. In such cases evidence of another safe, convenient, and accessible route is admissible for the purpose of showing that there was no necessity to make the attempt to pass over the manifestly hazardous way. One traveling by night has the same right as one traveling by day, but greater vigilance must be exercised, and the question whether such vigilance was exercised is ordinarily for the jury. It is true that the testimony discloses the fact that "the night was so dark that the hole could not be seen," but it also appears that the plaintiff was reasonably familiar with the location of the hole, and from that knowledge might be supposed to be able to avoid it. From common experience we know that one walking on a familiar street can, in the dark, avoid a known defect. Whether it was prudent for the plaintiff to attempt to do it in the case under consideration was, therefore, for the jury. The judgment of the court below granting a nonsuit and dismissing the action is reversed, and this cause is remanded for further proceedings; appellant to recover the costs of this appeal.

REAVIS, C. J., and FULLERTON, ANDERS, DUNBAR, MOUNT, and HADLEY, JJ., concur.

Teager *v.* City of Flemingsburg.

(Court of Appeals of Kentucky, Feb. 7, 1901.)

[60 S. W. Rep. 718.]

Personal Injuries—Traveler Stumbling over Step in Sidewalk.—The building of a sidewalk by a city with a step, which, from the nature of the grade, the city government deems necessary and proper, is not such negligence as will warrant a recovery against the city by one injured in a fall caused by the step, unless the plan of construction adopted was manifestly unsafe.

Appeal from circuit court, Fleming county.

"To be officially reported."

Action by M. M. Teager against the city of Flemingsburg to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

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Thos. L. Given, G. A. Cassidy, and John P. McCartney, for appellant.

O. R. Bright and W. G. Dearing, for appellee.

In Dubois v. City of Kingston, 102 N. Y. 219, 6 N. E. 273, the plaintiff was injured by stumbling and falling over a stepping stone placed in one of the defendant's sidewalks. In denying his right of recovery, the court used this language: "It would be extending the rule of liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping stones on the edge of sidewalks in front of hotels, stores, public buildings, and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by the failure of their officers to keep the streets and sidewalks in a proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping stones, which are almost a necessity in providing for the interests, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constituted a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby." It may frequently be, and we know it is sometimes, necessary to break the angle of sidewalk grades by steps. The determination of the necessity and the plan should be left to the discretion of the governing or legislative body of the city, subject to control in cases of such manifest error or mistake as would indicate a failure to consider or a purpose to misconstruct the work. The ruling of the lower court in giving the peremptory instruction being in accord with these views, the judgment is affirmed.

Benton *v.* City of Philadelphia.

(*Supreme Court of Pennsylvania, Feb. 18, 1901.*)

[48 Atl. Rep. 267.]

Defective Driveway in City Park—Injury to Bicycle Rider—Contributory Negligence.—A person riding a bicycle down hill on a drive in a city park, on a clear day, thrown by going into a ditch extending part way across the path, is guilty of contributory negligence preventing recovery; there having been nothing to prevent his seeing the ditch if he had been looking where he was going, but he, having lost his pedal, had been looking down trying to catch, as it came round, the pedal which he had lost.

Appeal from court of common pleas, Philadelphia county.

Action by George V. Benton against the city of Philadelphia for injury received by being thrown from his bicycle while riding down hill on a drive in Fairmount Park on a clear day. The accident was occasioned by his riding into a ditch extending part way across the path. There was nothing to have prevented his seeing it if he had been looking where he was going; but he had lost his pedal, and was looking down

trying to catch it as it came round. Judgment for defendant. Plaintiff appeals. Affirmed.

Thomas A. Fahy, for appellant.

Samuel Chew and Howard A. Davis, Asst. City Sols., and John L. Kinsey, City Sol., for appellee.

PER CURIAM. The court below entered a compulsory nonsuit, and refused, on motion, to take it off. The ground of the nonsuit was the contributory negligence of the plaintiff, and this was fairly established by his testimony. He was riding on his bicycle at the time he was injured, and, if he had given proper attention to the operation of it, and had looked where he was going, he could have easily and safely avoided the occurrence of which he complains. It was an unfortunate occurrence, but not such as would authorize a judgment against the defendant. The assignment of error is dismissed. Judgment affirmed.

Blume *v.* City of New Orleans.

(*Supreme Court of Louisiana, Dec. 3, 1900.*)

[29 So. Rep. 106.]

Sidewalk—Duty to Keep in Safe Condition.—Municipal corporations owe it to the public to keep the sidewalks in such a condition that pedestrians who are ordinarily careful will not be exposed to injury.

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Mary Blume against the city of New Orleans. Judgment for plaintiff. Defendant appeals. Affirmed.

Repeated decisions have settled that municipal corporations owe it to the public to keep the sidewalks in such condition as will not expose the pedestrian to injury. The banquettes are to be kept in a condition safe enough to walk on in the nighttime as well as during the day. The defendant had the power to establish and maintain a uniform grade. Instead it sanctioned two banquettes, on adjacent properties, of dangerously different grades; one high and the other low. By the evidence the accident is traced directly to the obstruction, the shed, and the defective light at the place where the obstruction was. The plaintiff, it appears, was ordinarily careful. She had not before passed at night on the banquette at the place in question. The banquette was not safe. Plaintiff was injured while exercising due care. She suffered damages. As relates to the quantum, we do not think it should be reduced from what it was fixed by the district court. The extent of the injury would not justify us in finding less. There remains only one alternative to us, and that is to affirm the judgment.

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Broffee *v.* City of Grand Rapids.

(Supreme Court of Michigan, June 4, 1901.)

[86 N. W. Rep. 401.]

Defective Sidewalk—Personal Injuries—Presentation of Claim—Limitation—Operation of Charter.—Rev. Charter Grand Rapids, tit. 4, § 8, which is not retroactive, and which requires notice of an injury arising from a defective sidewalk to be presented to the common council within sixty days, and requires suit to be brought within one year after the council has had reasonable time to investigate the claim, does not apply to a claim for injuries received before the charter went into effect.

Error to superior court of Grand Rapids; Allen C. Adsit, Judge.

Suit by Bridget Broffee against the city of Grand Rapids for injuries alleged to have been received from a defective sidewalk. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Lant K. Salsbury, for appellant.

McKnight & McAllister, for appellee.

It is insisted plaintiff's right of action was barred by her failure to present her claim. Counsel say: "The charter amendment of 1895, requiring the presentation of damage claims to the common council, dealt with the remedy only, and did not affect the right of action. It was the purpose of the amendment to allow the city authorities an opportunity to investigate the circumstances of the alleged injury before the evidence in the matter became lost, or obscured, or subject to distortion; and such a regulation is reasonable and valid. Selden v. Village of St. Johns, 114 Mich. 698, 72 N. W. 991; Davidson v. City of Muskegon, 111 Mich. 454, 69 N. W. 670; Mason v. City of Muskegon, 111 Mich. 687, 70 N. W. 332." A reference to these cases will show that the injury occurred after the charter provisions became law, and they are not controlling in this case. There is nothing in the provisions of the charter to indicate it was intended to be retroactive. If the contention of the counsel for the city is to prevail, persons having claims against the city would not be upon an equal footing. In the case at bar, if plaintiff's claim that she was injured on the 20th of May is true, she would have but 53 days after the law took effect in which to present her claim, while, if she had been injured 50 days earlier, she would have had but 3 days to present her claim, while persons receiving injuries after this charter provision became operative would have the full 60 days. We do not think the statute should be given a construction which will lead to such results. The case is governed by Angell v. City of West Bay City, 117 Mich. 685, 76 N. W. 69, and cases there cited. The judgment is affirmed. The other justices concurred.

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Terryll *v.* City of Faribault.

(Supreme Court of Minnesota, Dec. 14, 1900.)

[84 N. W. Rep. 458.]

Defective Sidewalk—Notice of Injury.—This is an action for damages caused by a defective sidewalk. It appears from the allegations of the complaint that the plaintiff signed the notice and statement of her claim with the initials of her husband's name, instead of her own: *held*, that the notice was prima facie sufficient.

(Syllabus by the Court.)

Appeal from district court, Rice county; Thomas S. Buckham, Judge.

Action by Cora V. Terryll against the city of Faribault. Action dismissed. From an order granting a new trial, defendant appeals. Affirmed.

Thomas H. Quinn, for appellant.

Batchelder & Batchelder, for respondent.

START, C. J. This action was brought in the district court of the county of Rice to recover damages alleged to have been sustained by the plaintiff by reason of a defect in a sidewalk of the defendant city. On the trial of the cause the defendant objected to the introduction of any evidence, "on the ground that the party suing and the party who gave the notice is not the same party." The trial court sustained the objection and dismissed the action. The plaintiff then made a motion for a new trial, and the defendant appealed from an order granting it.

The only question presented by the record for our decision is whether the allegations of the complaint show a substantial compliance with the provisions of chapter 248, Laws 1897, the here material provisions of which are these: "Before any city * * * shall be liable to any person for damages * * * the person so alleged to be injured, or some one in his behalf, shall give to the city * * * council, within thirty days after the alleged injury, notice thereof; and shall present his or their claim to compensation to such council or governing body in writing * * * stating the nature of the relief demanded from the city, and such body shall have ten days' time within which to decide upon the course of action it will pursue with relation to such claim." The complaint alleges that the plaintiff caused notice of her injury and a written statement of her claim to compensation therefor to be given to the city council of the defendant, and that such council considered her claim and rejected it. The complaint then sets out in full the written notice and statement by her so presented to and acted upon by the council, from which it appears that the plaintiff complied with the statute in all substantial respects, except the notice and statement was signed, "S. G. $\overset{\text{her}}{\underset{\text{mark.}}{\text{X}}}$ Terryll," with two subscribing witnesses. The complaint then alleges that "the initials preceding the surname of plaintiff, as subscribed to such notice, were the

initials of her husband, which she ordinarily employs in writing her name; her own Christian name being Cora V. as it appears in the entitling clause of this complaint." It thus clearly appears upon the face of the complaint that the party suing and the party who gave the notice are one and the same person, and the only question is whether the plaintiff must be turned out of court on the statement of her complaint because she did not sign her name to the notice with strict accuracy. We answer the question in the negative. If the allegations of the complaint be true, it is not apparent how the defendant could have been prejudiced by the mistake in the initials. The complaint shows on its face a prima facie compliance with the statute as to giving notice of the plaintiff's injury. Order affirmed.

Teryll *v.* City of Faribault.*

(Supreme Court of Minnesota, Nov. 8, 1901.)

[87 N. W. Rep. 917.]

Second Appeal—Law of Case.—A former decision in this case (84 N. W. 458, 81 Minn. 519) with respect to the sufficiency of the notice of a claim for damages given pursuant to chapter 248, Laws 1897, followed.

Defective Sidewalk—Amount of Recovery Not Limited to Amount Claimed in Notice of Injury.—In an action against a city or village for damages for injuries caused by a defective street, the injured party is not limited in his recovery to the amount claimed in his notice, given pursuant to chapter 248, Laws 1897. While that statute requires the notice to contain a specification of the compensation claimed, the injured party is not concluded by the amount stated therein, but may recover his actual damages.

(Syllabus by the Court.)

Appeal from district court, Rice county; Thomas S. Buckham, Judge.

Action by Cora V. Teryll and others against the city of Faribault. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Thomas H. Quinn, for appellant.

Batchelder & Batchelder, for respondent.

BROWN, J. This action was brought to recover damages for personal injuries alleged to have been caused by the defective condition of a sidewalk in defendant city. Plaintiff had a verdict in the court below, and defendant appealed from an order denying a new trial. Two questions are presented for consideration: (1) Whether the notice or claim for damages served upon the city pursuant to the provisions of chapter 248, Laws 1897, was sufficient; and (2) whether plaintiff is concluded with respect to the amount of recovery by the sum claimed in such notice.

The case was here on a former appeal, and the notice of claim for damages was then held sufficient. 81 Minn. 519, 84

*For former opinion see preceding case.

N. W. 458. That decision, whether right or wrong, must be treated as the law of the case, and the question cannot be re-examined at this time.

Chapter 248, supra, provides that before any city or village in this state shall be liable to any person for damages for or on account of any injury alleged to have been received or suffered by reason of any defect in any bridge, street, road, or sidewalk, the person so alleged to have been injured, or some one in his behalf, shall give to the city or village council, within 30 days after the injury, notice thereof, and shall present his claim for compensation to such council, stating therein when and where, and the circumstances under which, he was injured, and the amount of compensation demanded. By the notice served in this case plaintiff claimed the sum of $500 as compensation for her injuries, but subsequently brought her action to recover $1,000. The trial court was requested to instruct the jury that she was limited to the amount claimed in the notice, and could recover no more. The instruction was refused, and the refusal is assigned as error. We are of opinion that the learned trial court was right, and that plaintiff was not limited in her recovery to the amount claimed in the notice. The object and purpose of the statute requiring the notice to be given is to furnish information to the municipal authorities of the happening of the accident, and that a claim for damages is made therefor, to enable the authorities to make timely investigation into the cause of the accident, the nature and extent of the injuries claimed to have been received, and, if the municipality be found liable, to make settlement and payment of the claim. No reason occurs to us why the recovery in an action for such injury should be limited to the amount claimed in the notice. The case cited from Iowa,—Marsh v. Benton Co., 75 Iowa, 469, 39 N. W. 713, —though apparently in point, does not seem to us in harmony with the general principles of law in analogous cases, and we cannot follow it. An attorney frequently presents a bill to his client for services rendered making claim to a definite and specific sum, and, when the client refuses or fails to pay, action is brought to recover a much larger amount. It was held in Wilson v. Railroad Co., 31 Minn. 481, 18 N. W. 291, that the attorney was not bound by the bill rendered by him. See, also, Allis v. Day, 14 Minn. 516 (Gil. 388). The same rule should apply in all cases where specific claim is made for unliquidated damages, and we are of opinion that it does. The question has arisen in other courts, and the decisions have been adverse to appellant's contention, and to the effect that a party is not bound by the amount stated in his notice or claim, in case he is compelled to bring an action to enforce his rights. Minick v. City of Troy, 83 N. Y. 514; Reed v. City of New York, 97 N. Y. 620; City of Wyandotte v. White, 13 Kan. 191.

Order affirmed.

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McLean *v.* City of Boston.

(*Supreme Judicial Court of Massachusetts, Norfolk, Nov. 20, 1901.*)

[61 N. E. Rep. 758.]

Personal Injuries—Sufficiency of Notice.—A sufficient notice of personal injuries given a municipal corporation within 30 days is not ineffectual because plaintiff has given an insufficient one before, and has failed for 5 days to comply with its request for a further notice.

Exceptions from superior court, Norfolk county; Robert R. Bishop, Judge.

Action by Margaret McLean against the city of Boston. Judgment for plaintiff, and defendant brings exceptions. Overruled.

It appeared that plaintiff first served a notice of injury on defendant which was defective in not stating the place of injury, but later, and within 30 days, filed a sufficient notice. The defendant requested the court to rule that, the plaintiff having served a notice on the city which was defective, and having been served with a notice requesting a further notice which should comply with the law, and the plaintiff not having given a further written notice within five days of the receipt of said request, the plaintiff could not recover. The court refused so to rule, the jury found for the plaintiff, and defendant excepted.

David W. Murray and Wm. F. Nagle, for plaintiff.

Samuel M. Child, for defendant.

PER CURIAM. A sufficient notice given within 30 days is none the worse that the plaintiff has given an insufficient one before.

Exceptions overruled.

Fiske Wharf & Warehouse Co. *v.* City of Boston.

(*Supreme Judicial Court of Massachusetts, Suffolk, April 13, 1901.*)

[60 N. E. Rep. 7.]

Injuries to Wharves and Docks—Driftwood—Presentation of Claim Not a Condition Precedent to Right to Sue.—St. 1875, c. 185, § 5, providing that the board of park commissioners shall estimate and determine all damages sustained by any persons by the taking of land, or other acts of said board in the execution of the power vested in them, applies only to cases where land is taken by eminent domain; and hence the owner of a dock which has been injured by parts of an old wharf taken apart by order of such board being allowed to drift into and to the bottom of the dock is not required to petition for damages, as a condition to his right to sue the city in tort.

Appeal from superior court, Suffolk county.

Action by the Fiske Wharf & Warehouse Company against the city of Boston. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Saml. M. Child, for appellant.

Henry F. Strout, for respondent.

LORING, J. We understand that it is agreed by the parties that the old wharf was removed by the board of park

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commissioners of the defendant city, and that the construction of the new pier only was done by an independent contractor. It is further "agreed that if, from the facts herein stated, the court should be of the opinion that the defendant is liable to the plaintiff in this action, judgment shall be entered for the plaintiff in the sum of fifteen hundred and ninety-nine dollars and fifty cents ($1,599.50), and interest from February 20, 1899." It is plain that the defendant city is liable for injury to the plaintiff's dock caused by waterlogged timber and piles, part of the old wharf which was being taken apart and removed by them, being allowed to drift into, and to the bottom of, the plaintiff's dock. The only defense set up by the city to this claim is that the plaintiff's remedy for that injury is not an action of tort, but a petition for damages, under St. 1875, c. 185, § 5. There is nothing in that. That section applies only to cases where damages are caused as part of the taking of land under the power of eminent domain, as in Holleran v. City of Boston, 176 Mass. 75, 57 N. E. 220. As it is agreed that judgment shall be entered for the plaintiff in the sum of $1,599.50 if any liability is disclosed on the part of the defendant, it is immaterial that some of the piles and timber in the bottom of the plaintiff's dock came from the construction of the new pier by an independent contractor, for whose acts the defendant was not liable. Judgment affirmed.

Saunders *v.* City of Fitzgerald.

(*Supreme Court of Georgia, May 25, 1901.*)

[38 S. E. Rep. 978.]

Claim against City—Presentation—Right of Action.—Inasmuch as the act of December 20, 1899 (Acts 1899, p. 74), requires that certain claims against municipal corporations shall be presented for adjustment to the municipal authorities before suit can be brought thereon, and allows such authorities 30 days within which to consider and act upon such a claim, suit cannot be brought upon such a claim until after the municipal authorities have acted upon the claim, or after the expiration of 30 days from the time the claim is presented, unless there is a legal excuse for failure to comply with the provisions of the act. (Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Action by J. T. Saunders against the city of Fitzgerald. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Williams and Eldridge Cutts, for plaintiff in error.

E. W. Ryman, for defendant in error.

SIMMONS, C. J. The act of December 20, 1899, requires, as a condition precedent to any suit upon a claim for money damages against a municipal corporation on account of injuries to person or property, that the claim shall be presented for adjustment to the municipal authorities. The act further provides that the municipal authorities shall have 30

days from the time of such presentation within which to consider and act upon such claim, and suspends the running of the statute of limitations during the time the claim is pending before such authorities without action on their part. In the present case the original petition made no allegation whatever that the claim had been presented to the municipal authorities. It therefore set out no cause of action. The amendment offered alleged that the claim had been presented before suit was brought, and that the municipal authorities had failed and neglected for more than 30 days to act upon it, but there was no allegation that the claim was presented more than 30 days before the suit was brought. So far as appears from the allegations made, the claim may have been presented to the municipal authorities on one day and suit brought on the next. The act contemplates that suit shall not be brought until after the municipal authorities have acted upon the claim, or have failed to take action thereon, within 30 days. The amendment was, therefore, itself faulty, and was insufficient to perfect the original petition. The trial judge did not err in refusing to allow the amendment or in sustaining the demurrer to the petition. Judgment affirmed. All the justices concurring.

Foster *v.* Village of Bellaire.

(*Supreme Court of Michigan, June 4, 1901.*)

[86 N. W. Rep. 383.]

Defective Sidewalk—Personal Injuries—Presentation of Claim May Be Waived.—The provision of the statute requiring notice of an injury caused by a defective village sidewalk to be served on the village within a certain time may be waived by the town council.

Same—Same—Evidence—Mortuary Tables.—Where evidence in an action against a village for injuries caused by a defective sidewalk does not show that she may not recover, it is error to allow mortuary tables to be introduced.

Error to circuit court, Antrim county; Frederick W. Mayne, Judge.

Action by Cynthia A. Foster against the village of Bellaire for injuries sustained by reason of a defective sidewalk. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Leavitt & Guile, for appellant.

George H. Cross, for appellee.

MOORE, J. This action was brought to recover damages alleged to have been sustained by reason of a defective sidewalk. The injury was received on the evening of the 12th day of May, 1899. On the 6th day of July, 1899, a notice of claim for damages was served on the defendant village, which was neither itemized nor verified; and on July 15th a second claim was served, which was itemized and verified, and in form fully complied with all the requirements of the statute. It is conceded by the plaintiff that the statement of the plain-

tiff's claim as served on the 6th day of July does not comply with the statute, in that it was not itemized and verified, and that the statement of the claim served on the 15th day of July, while sufficient in form, was not served within the time required by the statute. The plaintiff, however, relies upon the subsequent conduct of the defendant in relation to the claim to establish a waiver of the defects in the claim as served. The trial court submitted the question of waiver to the jury. A verdict of $500 was rendered in favor of plaintiff. Many assignments of error are discussed by counsel, but we deem it necessary to refer to but two of them.

It is insisted by counsel that the requirements of the statute are mandatory, and cannot be waived by the common council. The precise question presented by this case was before the court in Griswold v. City of Ludington, 116 Mich. 401, 74 N. W. 663, and was decided against the contention of counsel for the defendant. See, also, Wright v. Village of Portland, 118 Mich. 23, 76 N. W. 141, and cases there cited; Sax v. Railway Co. (Mich.) 84 N. W. 314; and Leach v. Railway Co. (Mich.) 84 N. W. 316.

The testimony offered on the part of the plaintiff tended to show that she was seriously injured, but it did not show she might not recover from her injuries. Against the objection of counsel for defendant, the tables of mortality were introduced in evidence. In Mott v. Railway Co., 120 Mich. 127, 79 N. W. 3, it was held, "Mortality tables are only admissible in cases of permanent injury, or when the suit is brought by the representatives of a deceased person." For this error, judgment is reversed, and a new trial ordered. The other justices concurred.

Collins et al. *v.* Asheville Land Co.

(*Supreme Court of North Carolina, June 7, 1901.*)

[39 S. E. Rep. 21.]

Land Companies—Plats—Irrevocable Dedication of Streets.—Where an improvement company laid off land into numbered city lots and streets, making a plat thereof, and sold lots as marked and numbered on the plat, with reference thereto in the deeds, such acts constituted an irrevocable dedication of the streets in favor of purchasers of the lots against the improvement company's successors in interest, who had notice of the plats and sales made thereunder, though no registration of the plat was made.

Douglas, J., dissenting.

Appeal from superior court, Buncombe county; Allen, Judge.

Action by H. T. Collins and others against the Asheville Land Company to enjoin the closing of certain streets. From a judgment for plaintiffs, defendant appeals. Affirmed.

Zebulon Weaver, for appellant.

Bourne & Parker, for appellees.

The principle of law involved in this case is, we think, the

same as that in Conrad v. Land Co., 126 N. C. 776, 36 S. E. 282. The inconvenience and loss which may arise here from the enforcement of that principle of law will be greater than it was in that case, but that argument would not be allowed to influence us in our decision. The courts of the states in which the question before us has been presented and decided are divided. In some jurisdictions it has been held that, where lots have been sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, like the one before us, the purchaser of a lot does not acquire a right of way over every street laid down upon the plat. Pearson v. Allen, 151 Mass. 79, 23 N. E. 731. There the court said in support of its position: "In Regan v. Gaslight Co., 137 Mass. 37, it was held that the defendant could close a whole series of streets on the plat, leaving open the private ways adjoining the plaintiff's lots to the highway in one direction, and to the next side street in the other." In other courts it is held that a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat or map kept open. This view is so well and clearly stated in Elliott, Roads & S. § 120, that we quote it: "It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a street or road, but, where streets and roads are marked on a plat, and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication." In Conrad v. Land Co., supra, this court adopted the view that the purchaser had a right of way over all the streets designated on the plat, and that each and all of such streets must be kept open; and cited a case from each of the states of New Jersey and Oregon in which the same principle had been adopted. We are not disposed, after careful consideration, to alter the decision made in that case. The matter of registration of the plat in Conrad v. Land Co. was mentioned, but we are satisfied that registration of the plat is not essential. Registration is only a

means of publication of the plan or scheme, and is not such an instrument as is required to be registered by the laws of this state. It is the offer of sale by the plat and the sale in accordance therewith that is the material thing which determines the rights of the parties. The defendant, the Asheville Land Company, had actual notice of the plat and sales thereunder made by the improvement company, and is therefore fixed with notice of the dedication of the streets. Besides, it had notice from the registration of the deeds from the improvement company to purchasers. There is no error in the judgment of the court below, and the same is affirmed.

Flinn et al. *v.* Mowry.

(*Supreme Court of California, Jan. 29, 1901.*)

[63 Pac. Rep. 724.]

Street Improvement—Paving by Private Parties—Permit—Statutes.—Street Improvement Act, § 7, subd. 10, which declares that owners of land may perform the "grading" on the street in front of their property "after obtaining permission from the council to do so," applies only to the grading of streets, and hence no permit was required from the board of supervisors to authorize abutting owners to contract for the private "paving" of a street.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by one Flinn and another against Ellen M. Mowry. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Reversed.

R. Percy Wright, for appellant.

J. C. Bates and D. H. Whittemore, for respondents.

It is urged by the appellant that the court erred in excluding certain questions tending to show that the street was closed by the plaintiffs while performing their work thereon, and that in the performance of their contract they dug up and disturbed the street. These questions are claimed to have been proper for the purpose of showing that, inasmuch as the plaintiffs did not obtain permission from the board of supervisors to do the work, the contract therefor was illegal, and could not be the basis of a recovery. City and County of San Francisco v. Buchman, 111 Cal. 25, 43 Pac. 396, is relied upon in support of this contention. That case, however, was decided upon the provision in subdivision 10 of section 7 of the street improvement act, which declares that the owners of land may perform the "grading" upon the street in front of their property "after obtaining permission from the council to do so." The contract in the present case is for other work than grading, and this provision of the section has no application. A contract is not to be held unlawful unless it is either contrary to some express provision of the law or to its policy. Civ. Code, § 1677. This restriction on property owners from doing work upon the street in front of their

property is limited to grading, and the provision in a subsequent portion of the section that "whenever any owner or owners of any lots or lands fronting on any street shall have heretofore done or shall hereafter do any work (except grading) on such street in front of any block at his or their expense," the work so done shall be excepted from any order for improving the street, implies the right of the owner to do such work, and to contract therefor, without obtaining such permission. Under their general supervision of the streets of the city the board of supervisors have adopted an ordinance forbidding any one from digging up or disturbing a street without the permission of the superintendent of streets; but, as permission from the superintendent was obtained in the present case, the questions which were excluded by the court were immaterial. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

City of Omaha *v.* Redick.

(*Supreme Court of Nebraska, Jan. 23, 1901.*)

[85 N. W. Rep. 46.]

City Street—Taking Private Property for—Effect of Judgment in Suit by Owner against City.—Where the city appropriates for a street the lands of an individual, who subsequently sues the municipality and recovers their value, such judgment has the effect to invest the city with title to the lands.

Error to district court, Douglas county; Fawcett, Judge.

Action by John I. Redick against the city of Omaha. Judgment for plaintiff. Defendant brings error. Affirmed.

W. J. Connell and Edgar H. Scott, for plaintiff in error.

W. A. Redick, for defendant in error.

HOLCOMB, J., in delivering the opinion of the court said: "It is insisted, however, that to permit the maintenance of this action is equivalent to allowing him to retain title, and at the same time to recover the value of the property, but we do not think so. A judgment for its value has the effect to invest the city with title to the land. The action is analogous to actions for conversion of personal property. Lewis, Em. Dom. § 623; Pope v. Benster, 42 Neb. 304, 60 N. W. 561; City of Omaha v. Croft (Neb.) 82 N. W. 120."

State (Beecher et al., Prosecutors) *v.* Board of Street and Water Com'rs of City of Newark et al.

(*Court of Errors and Appeals of New Jersey, Nov. 19, 1901.*)

[47 Atl. Rep. 466.]

Ordinances—Archway over Street.—Newark City Charter, § 31, subd. 8, granting the common council power to prevent or regulate the construction of any step, platform, bay window, area, sign, or any post or erection or any projection in, over, or on any street, does

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not authorize an ordinance granting permission to a property owner to construct and maintain an archway over a street connecting buildings on both sides thereof.

Van Syckel and Fort, JJ., dissenting.

Error to supreme court.

Certiorari by the state, on the prosecution of Joseph A. Beecher and others, against the board of street and water commissioners of the city of Newark and others, to question the validity of an ordinance. There was a judgment by the supreme court setting the ordinance aside (46 Atl. 166), and the defendants bring error. Affirmed.

Joseph Coult and William H. Corbin, for plaintiffs in error.

Joseph A. Beecher, for defendants in error.

PER CURIAM. The certiorari which brought this matter before the supreme court brought up an ordinance of the board of street and water commissioners of the city of Newark, passed March 1, 1900, entitled "An ordinance granting permission to the Prudential Insurance Company of America to erect, construct and maintain an arch over and upon Bank street, in the city of Newark, between Broad street and Halsey street, and connecting the same with the building of the said company now being erected on both sides of the street." The writ was sued out by Joseph A. Beecher and others, who were owners of real estate fronting on Bank street. The provision of the city charter which is relied on as empowering the municipal authorities to make a grant such as is contained in this ordinance is section 31, subd. 8, which is as follows: "That the common council shall have power within the said city to make, establish, publish and modify, amend or repeal ordinances, rules, regulations, or by-laws, for the following purposes, viz.: * * * (8) To prevent or regulate the erection or construction of any stoop, step, platform, bay-window, cellar door, area, descent into a cellar or basement, sign or any post or erection, or any projection or otherwise in, over or upon any street or avenue, and to remove the same at the expense of the owner or occupant of the premises." P. L. 1857, p. 116. The powers in this respect have since been conferred on the board of street and water commissioners. The supreme court held that this provision of the city charter gave the municipal authorities no power to pass an ordinance such as the one in question. In that view we concur.

Underwood *v.* City of Worcester.

(*Supreme Judicial Court of Massachusetts, Worcester, Nov. 28, 1901.*)

[58 N. E. Rep. 589.]

Streets—Change of Grade—Street Railway—Damages.—Pub. St. c. 52, § 15, provides that an owner of land adjoining a highway shall have compensation for damage to his property by reason of any raising, lowering, or other act done for the purpose of repairing such way. Council granted a railway company a right to lay street-car tracks in front of petitioner's property; the grade of such tracks to be

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satisfactory to the street department. Tracks were laid to a grade fixed by the city engineer and approved by the superintendent of streets before such laying; such grade cutting down the street on petitioner's side of the street from four to five feet. No officer of the city directed or interfered with the work after its commencement: *held*, that the petitioner was not entitled to recover, since the change in the grade was made, under the ordinance, for the construction of a street railway, and not for the repair of the highway.

Exceptions from superior court, Worcester county.

Application by Anna E. Underwood for an assessment of damages caused to land abutting on a street by reason of changes made in the grade of such street by a street-railway company under an ordinance granted by the city of Worcester. From a verdict in favor of the petitioner, defendant brings exceptions. Exceptions sustained.

Webster Thayer, H. W. Cobb, and F. B. Hall, for petitioner.

A. P. Rugg, for defendant.

HAMMOND, J. At the trial the respondent asked for a ruling that the petitioner was not entitled to recover. The court refused to give the ruling, and the case was submitted to the jury, who found for the petitioner.

We think that the ruling should have been given. In granting the location the board of aldermen acted not as the agents of the city, but as public officers. They had the right to impose reasonable restrictions, and to see that the restrictions were complied with. The superintendent of streets, in so far as he appears to have had anything to do with the work, must be presumed to have acted under the decree, and not as the agent of the city or as the surveyor of highways. It does not appear that there was any change made which was not required, expressly or impliedly, by the decree. The work was done for the purpose of constructing, maintaining, and using the railway, and not for the repair of the highway; nor was it done by the surveyor, or other person intrusted with making specific repairs, within the meaning of Pub. St. c. 52, § 15. St. 1898, c. 578, was not in force at the time this work was done, and therefore we do not consider it. There is no other statute upon which the petitioner relies, and, in the absence of a statute remedy, the abutting landowner cannot recover damages by a change of grade in an existing highway. Callender v. Marsh, 1 Pick. 418; Vigeant v. City of Marlboro, 175 Mass. 459, 56 N. E. 708. Exceptions sustained.

Reed *v.* Peck et al.

(*Supreme Court of Missouri, Division No. 2, June 11, 1901.*)

[63 S. W. Rep. 734.]

Unauthorized Street Improvement—Personal Liability of Mayor and Members of Council—Joint Tort Feasors.—Where a street in front of plaintiff's property was graded without an ordinance authorizing it, and the mayor and the street committee of the common council were

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present superintending and encouraging the work, a judgment against them as joint tort feasors will not be reversed as not supported by the evidence.

Same—Same—Evidence—Hearsay.—Where a street in front of plaintiff's residence was graded without the passage of an ordinance authorizing it, and plaintiff sued the mayor and the street committee of the common council as joint tort feasors, evidence that the street commissioner told the witness that he was getting his orders for doing the work from the city council, while inadmissible as hearsay, was not prejudicial to defendants; the grading being done in pursuance of a resolution of the city council.

Appeal from Kansas City court of appeals.

Action by George R. Jacobs, revived in the name of James H. Reed, administrator, against the city of Columbia, F. W. Peck, and others. From a judgment of the Kansas City court of appeals affirming a judgment of the circuit court in favor of plaintiff, defendants appeal. Affirmed.

E. W. Hinton and Webster Gordon, for appellants.

Ev. M. Bass, Wellington Gordon, and W. M. Williams, for respondent.

BURGESS, J. Although defendant Guitar was mayor, and defendants Peck and Watson members of the committee on streets, of the city of Columbia, at the time of the commission of the grievances complained of, they are not sued in their official capacity, but they and all the defendants are sued as joint tort feasors, and they now make the point that there was no evidence to warrant the verdict and judgment against them. Notwithstanding this point is made, appellants virtually concede that all of the evidence is not embraced in the abstract, the evidence of several of the witnesses being left out entirely, while as to others only a brief synopsis or summary of what is called by defendants the substance of such testimony. As was said in the case of Epstein v. Clothing Co., 67 Mo. App. 221: "It will not do to allow appellant's counsel to cull over the record, and present such evidence as they may think pertinent or material. The entire evidence must be set out, so that this court may, for itself, determine its materiality and probative force." So, in Davis v. Vories, 141 Mo. 234, 42 S. W. 707, it was held that the supreme court will not pass upon the insufficiency of the evidence where it is not fully set out in the record. The same rule is announced in Ogelbay v. College of Dental Surgery, 71 Mo. App. 339. But, as was said by the court of appeals: "Even on the face of the testimony as shown by this imperfect abstract, we are not prepared to declare that there was no evidence to justify the verdict." The grading of this street in front of plaintiff's residence was, unquestionably, done without lawful authority; was a trespass. There was no ordinance providing for such grading. And, while the work was actively performed by the street commissioner, there was, it seems, evidence tending to prove that Mayor Guitar and Street Committeemen Peck and Watson were

present from time to time superintending and encouraging the work. In McMannus v. Lee, 43 Mo. 206, Judge Wagner, speaking for the court, says: "That any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures," etc., "or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his counsel and approval, and was thereby aiding and abetting the same." See, also, Leeser v. Boekhoff, 33 Mo. App. 223, and cases cited.

Mrs. Rives and Miss Irene Rives, witnesses for plaintiff, were permitted to testify, over the objection of defendants, that Coffee, the street commissioner, told them that he was getting his orders about the work from the city council, and in this ruling it is insisted that error was committed. It is argued that this testimony was pure hearsay, and prejudicial, since the jury may have gotten therefrom the idea that the members had personally been giving orders about the matter. While we are of the opinion that the facts disclosed by the evidence do not justify the conclusion that there was an understanding or agreement between the street commissioner and the appellants by which the grievances complained of were to be committed, and therefore the testimony mere hearsay, and inadmissible, we are unable to see in what way it was prejudicial to defendants, for it is clear that the street commissioner did perform the work in pursuance of a resolution passed by the city council. But, as the council had no authority to authorize the grading in front of plaintiff's residence otherwise than by ordinance, the resolution passed directing it was without authority, void, and afforded no protection to those who did the grading.

City of Louisville *v.* Bohlsen.

(*Court of Appeals of Kentucky, April 10, 1901.*)

[61 S. W. Rep. 1014.]

Changing Grade of Street—Measure of Damages to Abutting Property.—In an action against a city to recover damages for injury to property in changing the grade of a street, the criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of.

Same—Same—Instructions.—The failure of the court to expressly tell the jury, as it should have done, that the measure of damages was the diminution in value of plaintiff's property by reason of the acts complained of, is not reversible error, as the instructions fairly conveyed that idea, and the rulings of the court on the trial clearly indicated to the jury the true criterion of recovery.

Appeal from circuit court, Jefferson county, law and equity division.

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"Not to be officially reported."

Action by A. Bohlsen against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant.

Newton G. Rogers, for appellee.

GUFFY, J. The substance of plaintiff's claim is that the defendant, by reason of excavations, etc., on Chestnut to Twenty-Eighth street, and, in order to reduce the grade of same, damaged his property to the extent of $3,000, for which he prayed judgment. The defendant denied the damage, and in fact the answer may be considered as a denial of all the averments of the petition showing a right to recover. After the issues were fully made up, and proof heard, a jury trial resulted in a verdict and judgment in favor of plaintiff for $500, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

After a careful consideration of this record, we fail to perceive any error to the prejudice of appellant's substantial rights. The evidence is sufficient to sustain the verdict, and it seems to us that the instructions fairly present the law applicable to the case on trial. We do not think that the evidence at all sustains any such dedication of the street in question by plaintiff's vendors to the city as would deprive plaintiff of the right to recover in this case. The true criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of, and, while it is true that the instructions do not in words so state to the jury, yet the reasonable and fair meaning of the instructions given conveys that idea, and the rulings of the court on trial seem to us to clearly indicate to the jury the criterion of recovery. We do not think the court erred in the admission or rejection of testimony. If the so-called improvements made or caused to be made by the defendant lessened the value of plaintiff's property, it is perfectly clear that he was entitled to recover therefor. Judgment affirmed.

City of Louisville *v.* Harbin.

(*Court of Appeals of Kentucky, April 10, 1901.*)

[61 S. W. Rep. 1011.]

Street Improvement—Measure of Damages to Abutting Property.—In an action against a city to recover damages for injury to property in making a street improvement, the criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of.

Same—Dedication of Land for Street—Damages to Abutting Property.—The dedication of land for a street does not give the city the right to so construct the street as to materially damage the property of the dedicator or his vendees.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by D. M. Harbin against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant.

T. L. Burnett, Lane & Burnett, and W. W. Thum, for appellee.

GUFFY, J. The plaintiff in this action sought to recover $1,000 in damages against the defendant, alleged to have been sustained by him by reason of certain improvements or work on Grayson street. The answer is a traverse of plaintiff's right to recover. A trial resulted in a verdict and judgment in favor of plaintiff for $400, and, defendant's motion for a new trial having been overruled, it prosecutes this appeal.

We do not think that the court erred to the prejudice of the substantial rights of the defendant in the admission or erection of testimony. The evidence is abundantly sufficient to sustain the verdict.

Complaint is made as to the giving and refusing of instructions. It would have been well for the court to have expressly instructed the jury as to the criterion of recovery, which was the diminution in value of plaintiff's property by reason of the acts complained of. We think that the instructions given fairly presented the true criterion for recovery, and this is especially so in view of the fact that the court so often announced during the trial the true criterion of recovery.

It is insisted for appellant that the plaintiff did not deny that his vendor had dedicated the street to defendant. But the most that this could imply, under the pleadings in this case, would be that the dedicator merely allowed the city to establish a street at the place indicated without the formality of condemnation proceedings. But in no event could such dedication carry with it the right of the city to so construct a street as to materially damage the property of the dedicator or his vendees. Perceiving no error to the prejudice of the substantial rights of the defendant, the judgment appealed from is affirmed.

Barfield et al. *v.* Gleason et al. Same *v.* City of Louisville. Kimberger et al. *v.* Bitzer *et al.*

(*Court of Appeals of Kentucky, Oct. 30, 1901.*)

[64 S. W. Rep. 959.]

Street Improvement—Damages against City for Cancelling Advantageous Contract—Interest.—Where a city canceled an advantageous contract for a street improvement, and made a contract with another contractor whereby the cost, for which abutting property owners were liable, was increased, the amount of such increase adjudged to them as damages against the city should bear interest from the date of the judgment against them in favor of the contractor.

"Not to be officially reported."

Petition for rehearing. Granted in part.

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For former report, see 63 S. W. 964.

W. W. Thum, Phelps & Thum, Stanley E. Sloss, Shackelford Miller, and Barnett & Barnett, for appellant Barfield.

H. M. Lane, for appellee Gleason.

F. W. Morancy, for appellee Bitzer.

H. L. Stone, for appellee city of Louisville.

DU RELLE, J. By petition for rehearing we are asked to so extend the opinion as to include in the judgment authorized in favor of the property owners against the city of Louisville interest upon the amount which may be adjudged to be due them from the date of the judgment against the property holders in favor of the contractor. As the right of the property holder against the city is in the nature of damages which result from the city's unauthorized action, it necessarily follows that the measure of such recovery should be the damage actually inflicted thereby, which in this case is the difference in cost between the work as provided for in the McNaughton contract and under the Gleason contract, together with interest thereon from the date from which the property holder is compelled to pay interest on such difference, under the judgment against him in favor of the contractor.

To the extent indicated, the petition is granted, and the opinion extended.

City of Mt. Clemens *v.* Mt. Clemens Sanitarium Co., Limited.

(*Supreme Court of Michigan, June 17, 1901.*)

[86 N. W. Rep. 537.]

Streets—Dedication—Obstruction—Injunction.—Where a street was dedicated to a city, and accepted by the common council, and, after a fence erected around it by defendant had been destroyed by the city highway officers, defendant erected it again, and threatened to build on the property, the city was entitled to maintain a bill to restrain defendant from obstructing the street, and was not obliged to bring ejectment.

Appeal from circuit court, Macomb county, in chancery; James B. Eldredge, Judge.

Action by the city of Mt. Clemens against the Mt. Clemens Sanitarium Company, Limited. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Byron R. Erskine, for appellant.

O. C. Lungerhausen, for appellee.

HOOKER, J. The city of Mt. Clemens filed the bill in this cause to prevent the defendant from appropriating to its own use for the site of its building a parcel of land which the city claims to have been dedicated to the public for a city street by a former proprietor. The land was platted in 1874, and there is evidence clearly showing an acceptance of the plat by the common council. The dispute arises as to that portion of Greiner street forming a cul-de-sac, between blocks 1 and 2 of Greiner's addition, which, respectively, lie east and west

of the street. The defendant owns a portion of each of said blocks, and proposes to use it for a site for its sanitarium, and this, if done, would obstruct, and effectively close up, the street. The evidence indicates that this portion of the street was used but little, and that about the time that defendant purchased the land it claimed that the dedication was not valid; but, to cut off any dispute, an attempt was made to induce the common council to vacate this part of the street, or in some way surrender any public rights therein, but the measure failed to pass the council. It is claimed, and there is perhaps little doubt, that the refusal to do this was based upon an understanding on the part of the council that there was no street to vacate, but this does not signify, as a vacation of the street cannot be thus accomplished. Some months before this suit was instituted the defendant put a wire fence across the street, thus making the disputed portion a part of its inclosure. Subsequently the city highway officers forcibly took possession and destroyed the fence, and did some grading, a collision of some violence occurring at the time between them and defendant's agents. Soon after, defendant replaced the fence, and restored the premises to their former condition, and was in possession at the time that this suit was commenced to compel the removal of the obstruction and prevent the erection of the building in the street. Counsel for the defendant make the claim that the form of action is inappropriate, and that the defendant has a right to have his claim to title tried in ejectment. It is the rule that a bill to quiet title does not lie at the suit of one not in possession, and we have held that it will not lie in behalf of one who has taken possession by force for the purpose of filing such bill. See Watson v. Brewing Co., 61 Mich. 595, 28 N. W. 726; Wakefield v. Mining Co., 85 Mich. 622, 49 N. W. 135; Lillid v. Snow, 118 Mich. 613, 77 N. W. 241. And it was applied to one who sought to restrain the closing of a private alley where the complainant had forcibly invaded the premises and destroyed a fence which the latter had erected for the purpose of closing the alley. De Sale v. Millard, 108 Mich. 581, 66 N. W. 481. This bill is filed for a different purpose, viz. to compel the defendant to desist from obstructing a public way. It is a common method of abating a public nuisance, and we have in several instances granted relief upon such bills where the defendants have been in possession. 3 Pom. Eq. Jur. § 1349; State v. Goodnight (Tex. Sup.) 11 S. W. 119; City of Jersey City v. Central R. Co., 40 N. J. Eq. 417, 2 Atl. 262; City of Eau Claire v. Matzke (Wis.) 56 N. W. 874; City of Big Rapids v. Comstock, 65 Mich. 78, 31 N. W. 811; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Village of Essexville v. Emery, 90 Mich. 183, 51 N. W. 204; Village of Red Jacket v. Pinton (Mich.) 85 N. W. 567. Our investigation of the record leads us to the conclusion reached by the learned circuit judge who tried the cause. The plat and the

subsequent conduct of the proprietor clearly indicate a design to dedicate this land for the purpose of a street, and the resolution of the council shows as clear an intention to accept the dedication. The street was subsequently used by those who had occasion to use it for a time, and the testimony that it was afterwards closed up and used for agricultural purposes, to the exclusion of the public, is not conclusive either of the fact (for it is disputed) or of the intention on the part of the owners to make more than a temporary use of it. There was a good dedication in pais, even if the plat was informal, and a valid acceptance, and we think that title by adverse possession on the part of the defendant and its grantees is not proved. Public rights are peculiarly subject to infringement, because of the proverbial indisposition of the public to resent every aggression or invasion of its rights, and this is especially true as regards its highways. So long as an encroachment does not prevent use altogether, travelers are prone to put up with the inconvenience, and pass on. The propriety of permitting title to be obtained in this way to the public highways is of more than doubtful expediency, and is not common in other jurisdiction, though sanctioned here, when it is clearly established. Our views upon this subject were expressed in the case of Village of Red Jacket v. Pinton, which was a similar case in many respects. The decree is affirmed, with costs. The other justices concurred.

Morris *v.* City of Philadelphia et al.

(Supreme Court of Pennsylvania, May 13, 1901.)

[49 Atl. Rep. 70.]

Municipal Control of Streets—Power to Narrow or Vacate—Deeds.—A deed conveying land for a street to a city "to have and to hold * * * to the same extent and with the same effect as if the said street had been opened by a decree * * * on proceedings had for that purpose under the road laws of the commonwealth," gives the city the same power over the street, including the narrowing or vacating of it, as though it had been opened by adverse legal proceedings.

Same—Same—Damages.—The liquidation or payment of damages is not a prerequisite to vacation or narrowing of a street.

Appeal from court of common pleas, Philadelphia county.

Suit by J. Chester Morris against the city of Philadelphia and others, officers thereof. From a decree sustaining demurrer to and dismissing the bill, plaintiff appeals. Affirmed.

William S. Morris and G. Heide Norris, for appellant.

John H. Maurer and Francis L. Wayland, Asst. City Sols., and John L. Kinsey, City Sol., for appellees.

FELL, J. The object of this bill was to enjoin the city from improving Linmore street on the lines established by the board of surveyors, in pursuance of an order of city councils. The plaintiff is the owner of properties fronting on

the street, which he purchased in August, 1889, without notice that his grantor had dedicated the street to public use by deed dated July, 1888, accepted by the city May, 1890, and recorded in August of that year. The street as originally laid out varied in width at different points from 30 to 46 feet. The deed of dedication described the street as of the uniform width of 40 feet, and purported to convey the street as physically opened. A width of 40 feet includes part of a lot purchased by the plaintiff, in front of which the street as opened was but 30 feet wide, and there were other but less material variations between the lines of the street as they existed when the plaintiff bought and the lines as fixed by the deed of dedication. In 1899 the board of surveyors made and confirmed a plan in which Linmore street is plotted of a uniform width of 30 feet, and shortened at one end 70 feet. The proposed improvement of the street is in conformity with this plan.

The substance of the plaintiff's contention is that, while the deed of dedication is inoperative and a cloud on his title as far as it conflicts with his rights as a purchaser without notice, it is in all other respects valid and effective; that the street as laid out has been dedicated by implication by the opening thereof and use for 10 years, and by the acceptance by the city as shown by legislation concerning it; that by both the express and the implied dedication the city covenanted to use and maintain the street as a public highway, and that it cannot now vacate it except in the manner provided by the act of 1854. The ground covered by the street was conveyed to the city, "to have and to hold * * * to the same extent and with the same effect as if the said street had been opened by a decree of the court of quarter sessions for the county of Philadelphia upon proceedings had for that purpose under the road laws of the commonwealth of Pennsylvania." The deed gave to the city the same power over the street that it has over a street opened by adverse legal proceedings, and the right of the city to narrow or vacate a street so opened, under proceedings such as were instituted in this case, is beyond doubt, and the liquidation or payment of damages is not a prerequisite to a legal vacation. Wetherill v. Railroad Co., 195 Pa. 156, 45 Atl. 658. As the street plotted on the city plan is wholly within the lines of the street as originally opened, no right of the plaintiff growing out of his purchase without notice of the deed to the city is interfered with. For any injury he may sustain by reason of the narrowing or vacation, he has an adequate remedy at law. The decree sustaining the demurrer and dismissing the bill is affirmed.

Uhler *v.* Cowen et al.

(*Supreme Court of Pennsylvania, May 13, 1901.*)

[49 Atl. Rep. 77.]

Taking Leased Property for Street—Liability of Lessee for Rents.—A city having given notice to a property owner—under Act April 21,

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1855 (P. L. 266), authorizing it, on three months' notice, to open a street—that at the expiration of three months it would require certain of his land for a street, and he having served this notice on his lessees, and the property leased being of no value to them without the part claimed for a street, they may remove from the premises, without liability for rent after expiration of the three months, though the city does not then take possession; they being liable to be dispossessed at any time thereafter, and the owner being given by the act of 1855 an immediate remedy, on receipt of the notice, to obtain from the city full compensation for injury sustained.

Appeal from court of common pleas, Philadelphia county.

Action by Clara E. Uhler, executrix and trustee under the will of Taylor M. Uhler, deceased, against John H. Cowen and another, receivers of the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed.

W. B. Linn, for appellants.

T. A. Fenstermaker and John G. Johnson, for appellee.

MESTREZAT, J. We think the defendants were justified in removing from the premises in pursuance of the notice given them, and that their liability for rent ceased at the expiration of three months from October 26, 1896. This is just and equitable to them, and does no injury to the owner of the premises. The act of 1855 gave him an immediate remedy to obtain full compensation for the injury he sustained. The report of viewers shows that the sum awarded the plaintiff included all claims for rent against the defendants at the time the premises were taken. The city is not in a position to complain, as the vacation of the premises by the defendants was in pursuance of its notice that at the expiration of the period therein named the property would be required for public use, and would be entered upon to the extent required for its purposes. The plaintiff's right of action then accrued, and the act of 1891 required him to pursue it within six years from the date of the notice. It follows that the court below erred in entering judgment against the defendants for the full amount of the rent claimed by the plaintiff. The judgment is reversed, and judgment is entered on the case stated in favor of the plaintiff and against the defendant for the sum of $485.40; the costs of this appeal to be paid by the plaintiff.

Scharr et al. *v.* City of Camden et al.

(Court of Chancery of New Jersey, July 11, 1901.)

[49 Atl. Rep. 817.]

Street Improvements—Injunction—Estoppel.—A lot holder who consents to a change of grade of a sidewalk in front of part of her property, and who stands by without objection, while the city authorities do extensive work and expend money thereon and on the sidewalk of adjoining owners, will not be allowed an injunction to restrain the completion of the work on the remaining portion of the sidewalk.

Same—Same.—An injunction will not be decreed where its effect will be to continue a condition in a highway which is dangerous to

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those who pass over it. This is especially true where the threatened damage to the applicant for the writ is largely conjectural.
(Syllabus by the Court.)

Bill by Antonia Scharr and others against the city of Camden and others. Dismissed.

S. H. Richards and Thomas E. French, for complainants.
E. G. C. Bleakly, for defendants.

Reno et al. *v.* City of Iola.

(Supreme Court of Kansas, July 6, 1901.)

[65 Pac. Rep. 678.]

Streets—Dedication—Plats—Evidence.—An owner of land adjacent to a city platted it, and left the plat in the office of the register of deeds, but the plat was subsequently lost, and there was no evidence as to whether it was properly acknowledged and filed, but it was treated for several years as a plat of a regular addition. A strip of land 30 feet wide on the east of the addition was used as a street, and lots were sold abutting it, to which no other means of access existed. The street was afterwards closed, and an application was made to the city to open the same. The original owner had stated that he had intended the strip as a street, and supposed it had been duly laid out and dedicated as such; but a copy of the plat, made by a land agent for his own use, did not show that the strip was designated as a street: *held*, that such facts justified a finding that the strip had been dedicated as a street.

Error from district court, Allen county; L. Stillwell, Judge.

Action by the city of Iola against Joseph T. Reno and others. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

Oscar Foust & Son and Baxter D. McClain, for plaintiffs in error.

Travis Morse, for defendant in error.

PER CURIAM. As to the first claim of plaintiffs in error, it may be said that it does not appear that this strip of land was not formally dedicated as a street by Jones in 1872. It is true that a reliable witness made for his own use what he thinks was a copy of the original plat, and such copy, which is in evidence, does not show that the strip upon the north or the one upon the east was designated as a street; still he does not testify that such paper is an exact copy of the original plat in those respects, and, as he made it for his own use as a land agent, it is hardly probable that he would have gone to the trouble of copying the plat outside of the lots and blocks had streets been shown upon the original. Neither was it shown that such plat was not duly acknowledged or filed in said office, and, inasmuch as it was with other plats in the office and was treated as they were, the court may well have believed from the evidence that it was in fact duly acknowledged and filed, but that the register of deeds had failed to make a record thereof. Upon this proposition, as well as the second one raised by plaintiffs in error, it should also be noted that this strip of land did not lie adjacent to any other

land owned by Jones, was 1,090 feet long and only 30 feet wide, and would probably not have been reserved by the owner for any other purpose; and the fact that lots facing it were sold to be used for residence purposes, taken in connection with the subsequent statement of the owner that he intended the land for a street, and believed it to have been regularly dedicated for that purpose, would seem to justify the conclusion reached by the trial court.

McClellan et al. *v.* Town of Weston.

(*Supreme Court of Appeals of West Virginia, Sept. 7, 1901.*)

[39 S. E. Rep. 670.]

Incorporation of Town—Statute—Plan and Survey—Recordation—Notice to Parties Interested.—Sections 8 and 9 of an act of the general assembly of Virginia passed January 14, 1846, incorporating the town of Weston, are as follows: "(8) Be it further enacted, that all streets, cross streets and alleys, which are already laid off and opened, or which may at any time be located, surveyed and opened in said town, shall be and they are hereby established as public streets and alleys of the said town. (9) That the said trustees shall, within six months after the passage of this act, open all the public streets and alleys of said town; shall make or cause to be made a survey and correct plan or plat of said town, showing distinctly each lot, street and alley, and the size and width thereof, numbering anew all lots, and showing the former as well as the new numbers of all lots which have been numbered heretofore, with such remarks and explanations thereon as they may deem necessary and proper; which plan or plat so made out, and under the hands and seals of any four of said trustees, shall be lodged in the clerk's office of the county court of Lewis county, there to be recorded and kept; and the said plan and survey so duly made, signed, sealed and recorded, shall, in all future suits and contests concerning the boundaries of the lots, streets and alleys of the said town, be deemed, held and taken as full and conclusive evidence between the parties: provided, that infants, femes covert, persons non compos mentis, or out of the commonwealth, shall have six months after such disability shall be removed; within which time they may contest such plan and survey so made and recorded." Laws 1845–46, p. 139: *held*, that all real-estate owners in the town were bound to take notice of said act incorporating said town, as well as of the acts of the trustees required by said act to be performed thereunder in reference to the plan and survey of said town so to be made, signed, sealed, and recorded.

Same—Same—Same—Same.—Such plan and survey, when duly recorded, was full and complete notice to all abutting real-estate owners on the streets and alleys of said town of the claims of the town as to the location of the lines of such streets and alleys.

Same—Streets and Alleys—Adverse Possession against City.—Persons in possession of any portion or portions of such streets and alleys so laid out by having the same inclosed, and so continued in possession after the making and recording of such plan and survey, held such possession subject to the demands of the town whenever it should see proper to open such streets or alleys to their full width for the public use.

(Syllabus by the Court.)

Appeal from circuit court, Lewis county; C. C. Higginbotham, Special Judge.

Bill by Floride McClellan and others against the town of

Weston. Decree for complainants, and defendant appeals. Reversed.

E. A. Brannon, for appellant.

W. W. Brannon, for appellees.

Schettler et al. *v.* Lynch et al.

(Supreme Court of Utah, March 25, 1901.)

[64 Pac. Rep. 955.]

Dedication of Highway—Express and Implied—Intention.—A dedication of land for a public highway may be either express—as where the owner manifests his purpose by a grant evidenced by writing—or implied, when the acts and conduct of the owner clearly manifest the intention on his part to devote the land to the public use; but in either case it is always a question of intention, and no particular formality or form of words is necessary.

Same—Implied Dedication—Nature of.—An implied dedication is founded on the doctrine of equitable estoppel, and when land has been thus set apart as a highway for the use, convenience, and accommodation of the public, and enjoyed as such, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication.

Same—Same—Not within the Statute of Frauds.—An implied dedication of land as a highway is not within the statute of frauds, and may be established by parol, or in any conceivable way by which the intent of the owner can be made apparent.

Same—Same—Intention to Dedicate May Be Inferred from Long User.—Where land has been set apart by the owner for public use as a highway, and accepted by the public, the right of the public does not depend upon a 10 or 20 years' user or possession; the dedication may be inferred from long-continued use by the public with the knowledge of the owner, and without objection by him.

Same—Same—Same—Estoppel.—Where the evidence shows such a course of conduct and such acts respecting the land in controversy as clearly manifest an intention on the part of the owner to appropriate it to the public use as a highway, and such as were calculated to induce people to believe that the land was devoted to such purpose, and lull them into security as to any rights they might acquire with reference thereto, the law will imply a dedication.

Same—Same—Acceptance by the Public May Be Inferred from Necessity and Long User.—It appearing from the evidence that without the land in controversy the street would be but 1½ rods in width, and not of sufficient width to permit some teams to turn around, and that since it has formed part of the street it has been used more or less by the public, an acceptance of the dedication on the part of the public may be inferred.

Same—Same—Subsequent Grantees Bound by Dedication.—Land having been once dedicated by the owner of the soil as a highway, and having been accepted by the public all subsequent grantees of abutting lands are bound by such dedication, and have no right to obstruct any portion of the city.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by B. H. Schettler and others against E. P. Lynch and P. H. Riley. Judgment for plaintiffs. Defendants appeal. Affirmed.

Bennett, Harkness, Howat, Sutherland & Van Cott, for appellants.

Zane & Rogers and W. D. Riter, for respondents.

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City of Owensboro *v.* Muster et al.

(Court of Appeals of Kentucky, Oct. 25, 1901.)

[64 S. W. Rep. 840.]

Dedication of Street—Implied—Intent.—The question whether the owner of land has dedicated it as a street is one of intention, to be determined from all the circumstances, and a mere reference to a street in describing land conveyed is not sufficient to establish a dedication by implication.

Appeal from circuit court, Daviess county.

"To be officially reported."

Action by Sarah A. Muster and another against the city of Owensboro for an injunction. Judgment for plaintiffs, and defendant appeals. Affirmed.

Geo. W. Jolly, for appellant.

Little & Little, for appellees.

BURNAM, J. The appellees instituted this suit in the Daviess circuit court to enjoin appellant, the city of Owensboro, from prosecuting them in the city court for an alleged obstruction of Elm street, in that city. They allege that in the year 1870 they purchased from one Hoover a lot of ground, beginning at the northeast corner of Poplar and Harriet streets, and running eastward with Harriet street to the west line of the school-house lot, and thence northward with the line of the school lot 95 feet, and thence westward parallel with Harriet street to a point in the east line of Poplar, and thence with Poplar to the beginning; that the city is asserting the right to extend Elm street across the end of their lot next to the school-house lot, and had instituted a prosecution against them in the city court for obstructing Elm street because they had refused to surrender this portion of their lot to the city, to be used by it as a street. The city answered that at the time appellees bought the lot of ground described in their petition the part of it next to the school-house lot had been used by the public for more than 15 years as one of the public streets of the town, and that in recognition of this fact appellees had conveyed by general warranty deed to one Winter a part of the lot, and had described it as "a certain lot or parcel of ground lying and situated on the corner of Seventh and Elm streets, and running west with Seventh street 117 feet, thence north 47 feet, thence east 117 feet to the west margin of Elm street, thence south with Elm street 47 feet to the beginning"; and that they had fenced off between the lot sold to Winter and the school-house lot a strip of land 55 feet wide, which was a prolongation of Elm street; and that by reason of these acts they were estopped from asserting claim thereto. The evidence in the case is quite conflicting. Appellees admit that shortly after they purchased the lot they built a fence about 55 feet from the line of the school-house lot, thinking that the city would ultimately want to purchase the ground for street purposes; but they claim that to preserve their ownership they maintained a temporary fence

across the ends of the strip between their property and the school-house lot; that sometimes persons would tear down a panel or two, but that they always replaced it; and that when they executed the deed to Winter calling for Elm street they anticipated that the city would finally purchase the land and open the street, but that they never intended to part with their title without compensation. While Mr. Winter testifies that at the time he purchased the lot of appellees the public traveled over and used the ground in dispute, and that they did so for several years, but that appellees finally fenced it up. There is little or no evidence to show an acceptance of the alleged dedication by the city, or that they ever exercised authority over the land; and it is admitted that about the year 1892 the city offered to pave the street upon the condition that appellees would abandon their claims thereto. There is no claim that appellees expressly dedicated the land in dispute, but that the dedication arises by implication from the deed and other acts of appellant. One cannot be deprived of his property for public use against his consent without compensation, and a mere reference to a street for purposes of location and description is not alone sufficient to uphold a dedication by implication. It is essential to the validity of a dedication of this character that there should be an intention to dedicate on the part of the owner of the land. Dedication is therefore a conclusion to be determined from all the facts and circumstances in the case, and we are of the opinion that the purpose to dedicate the strip of ground in question has not been clearly established by the testimony in this case.

The question of Winter's right to use the land back of his lot as a street is not involved in this proceeding, and it is unnecessary for us to determine what his rights would be in reference thereto.

Judgment affirmed.

O'Donnell *v.* White, City Treasurer. Mitchell *v.* Same.

(Supreme Court of Rhode Island, Nov. 8, 1901.)

[50 Atl. Rep. 333.]

Street Repairs—Damages to Abutting Owners—Declaration—Sufficiency.—A declaration alleged that defendant city so negligently and improperly filled in certain streets that large quantities of earth were cast on defendant's land, which was raised above the entrances to plaintiff's store and dwelling, covering the cellar windows, and excluding light and air therefrom; that thereby the surface water flowed into plaintiff's store, causing damage to his business; and that by reason of said water the premises have been rendered badly suited for the use and health of plaintiff and his family: *held*, that a demurrer on the ground that no statutory duty on the part of the city to the plaintiff, which defendant had neglected or refused to perform, was disclosed, was not well founded, since the declaration was based solely on the city's common-law liability for doing a wrongful act.

Same—Same—Liability of City.—Where a city wrongfully enters on the land of an abutting owner, or wrongfully or negligently throws earth and gravel on it in repairing its streets, it is liable to damages therefor to the same extent as a private individual would be liable.

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Separate actions for damages by James H. O'Donnell and Farrell J. Mitchell against J. Ellis White, city treasurer. On demurrers to plaintiffs' petitions. Overruled.

Hugh J. Carroll, for plaintiffs.

Edward W. Blodgett, for defendant.

TILLINGHAST, J. We do not think the demurrer is well founded. The declaration does not purport to be based upon the failure of the city to discharge any statutory duty devolved upon it, but it is based solely on its common-law liability for the doing of the wrongful act. And, while not skillfully drawn, the declaration alleges, in effect, that while the defendant's servants and agents were lawfully at work on the streets named, under the direction of the city, they so negligently and improperly performed said work that large quantities of earth, etc., were thrown upon the plaintiff's premises, and large quantities of water caused to flow thereon, to his damage. We fail to see why such a declaration does not state a cause of action against the defendant city. It cannot be seriously contended that the defendant city has any right to invade private property in the manner set out in the declaration, either intentionally or negligently, while prosecuting a public improvement. It has no more right to occupy or appropriate private land outside of the limits of the highway, in making repairs or improvements thereon, than has a private individual to occupy or appropriate the adjoining land of his neighbor while making improvements on his own land; that is to say, "The same rule of law which protects the right of property in an individual against invasion from another individual must protect it from similar aggressions on the part of municipal corporations." City of Aurora v. Reed, 57 Ill. 33, 11 Am. Rep. 1. See, to the same effect, Wallace v. City of Muscatine, 4 G. Greene, 373, 61 Am. Dec. 131. Inman v. Tripp, 11 R. I. 523, 23 Am. Rep. 520, distinctly lays down the same doctrine.

Dannenberg *v.* Mayor, etc., of City of Macon et al.

(*Supreme Court of Georgia, Nov. 8, 1901.*)

[39 S. E. Rep. 880.]

Encroachments upon Streets—Discretion of Corporate Authorities.—The charter of the city of Macon confers upon the corporate authorities of such city the power, in their discretion, to grant encroachments upon its streets, but it is required that the city authorities should pay "due regard to the interests of property holders who are affected" by an encroachment granted in a given case. Kirtland *v.* City of Macon, 66 Ga. 385; Daly *v.* Railroad Co., 7 S. E. 146, 80 Ga. 793, 12 Am. St. Rep. 286.

Same—Same—Injunction—Judgment of Lower Court Reviewed and Affirmed.—The record in the present case does not disclose such an abuse of discretion, either on the part of the corporate authorities of the city of Macon or of the judge whose decision is under review, as would authorize this court to reverse his judgment refusing to grant an injunction to prevent the city authorities from carrying into effect

the ordinance granting an encroachment upon one of the streets of the city.
(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Joseph Dannenberg against the mayor and council of the city of Macon and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hardeman, Davis, Turner & Jones, for plaintiff in error.

Minter Wimberly, Roland Ellis, and Spencer R. Atkinson, for defendants in error.

PER CURIAM. Judgment affirmed.

Moore *v.* City of St. Paul.

(*Supreme Court of Minnesota, Feb. 14, 1901.*)

[85 N. W. Rep. 163.]

Bridges—Duty to Repair Bridge Not Originally Included in City Limits.—The provisions of the charter of the city of St. Paul impose upon the municipality the duty to keep in good repair for public use all streets, highways, and bridges within its limits: *held*, that the duty and obligation created by such charter extend to the bridge across the Mississippi river at Ft. Snelling, notwithstanding the fact that the bridge, when constructed, was not within the limits of the city, and that the statute under which it was constructed (chapter 125, Sp. Laws 1876) imposed such duty upon the county of Ramsey.

Same—Same—Charter Provision.—The limits of the city were subsequently extended to include this bridge, and it is *held* that the duty imposed upon the city to keep all bridges and streets within its limits in good repair became operative as to this particular bridge and the highway leading to it the moment the same were included within its limits.
(Syllabus by the Court.)

Appeal from district court, Ramsey county; George L. Bunn, Judge.

Action by Dellie Moore against the city of St. Paul. Verdict for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

James E. Markham, Franklin H. Griggs, and Frank Arnold, for appellant.

C. D. & Thos. D. O'Brien, for respondent.

City of Westport *v.* Mulholland.

(*Supreme Court of Missouri, Dec. 18, 1901.*)

[60 S. W. Rep. 77.]

Railroad in Street—Tearing up Street—Ordinance Prohibiting—Police Power—Obligation of Contract.—Defendant, in accordance with a grant from the county court, constructed a street railway on a county road; and subsequently the plaintiff city extended its territory so as to include such road within its limits, but prior to such extension had passed an ordinance providing that no person or persons should tear up or otherwise interfere with any of the streets of said city

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without first obtaining permission from the aldermen. The defendant tore up the streets, in reconstructing a switch, without first obtaining the required consent: *held*, that the ordinance was not unconstitutional, as impairing the obligation of defendant's contract with the county court, but constituted a valid exercise of the police power of the city, and defendant was liable for its violation.

In banc. Appeal from criminal court, Jackson county; John W. Wofford, Judge.

Action by the city of Westport against J. W. Mulholland. From a judgment of the criminal court reversing a judgment of the police court in favor of plaintiff, plaintiff appeals. Reversed.

VALLIANT, J. The ordinance in question is clearly a police regulation to protect the streets of the city. It was enacted before the city extended its limits, but when the limits were extended the ordinance covered all the territory taken in, and the inhabitants thereof, both natural and artificial. Hickman v. City of Kansas City, 120 Mo. 126, 25 S. W. 225, 23 L. R. A. 658. The city is charged with the duty of preserving its streets in a reasonably safe condition for the public use, the lives of its inhabitants and the safety of their property demand the performance of that duty, and the city could not devest itself of it if it desired to do so. If we say that the railroad company has a right to tear up the streets, without regard to the city's authority, then we have a power turned loose in the streets inconsistent with the particular sovereign power delegated by the state to the city, and liable to be destructive of the public safety. A private citizen sometimes has the right to dig up the street,—for example, if it be necessary to connect or repair a broken connection with a water main, a gas main, a sewer; and that right the city authorities cannot arbitrarily refuse, but the citizen must comply with the reasonable regulations, and obtain permission, and do the work as the ordinance requires. The corporation has as much right as the citizen, but no greater; that is, it has the right to dig up the street when necessary for its business, but, like the citizen, it must apply to the constituted authorities for leave, and act under reasonable regulations. It is argued by the learned counsel for the railroad corporation that the power to grant permission implies the power to refuse it, and thus puts the franchise at the mercy of the city authorities. But there is a law over the city authorities as well as over the corporation, and the ordinance is to be construed as designed to effectuate a lawful, and not an unlawful, purpose. It means that the railroad company cannot dig up the streets without permission of the board of aldermen, but it also means that the board of aldermen cannot refuse permission, under reasonable regulations, when the railroad company needs it.

"Under the agreed statement of facts, the defendant should have been held guilty of violation of the ordinance. The

judgment is reversed, and the cause remanded to the criminal court of Jackson county to be proceeded with according to the law as herein laid down. All concur."

R. B. Middlebrook and A. S. Marley, for appellant.

D. B. Holmes, Frank Hagerman, and Willard P. Hall, for respondent.

PER CURIAM. The foregoing opinion delivered by Valliant, J., in division No. 1, is adopted as the opinion of the court in banc, all the judges concurring.

Atlanta Ry. & Power Co. *v.* Atlanta Rapid-Transit Co.

(*Supreme Court of Georgia, May 20, 1901.*)

[39 S. E. Rep. 12.]

Appeal—Assignment of Error.—An assignment of error upon an order denying an application for injunction, made in the following words: "To which order the plaintiff excepted, and now excepts, and assigns the same as error, in that it is contrary to the law and the evidence in the case,"—is good. The motion to dismiss the writ of error for insufficient assignment of error is overruled.

Street Railways—Property in Franchise—Injunction to Restrain Interference by Another Company—Parties.—A street-railway company which has constructed, and is legally operating, a line of railway in the streets of a city, is possessed of such a property interest as gives it a legal right to maintain an application to restrain a similar company from interfering with its line of tracks already laid, and from constructing a line of road over its private property without authority of law. To such an application the city is not a necessary party defendant.

Ordinances—Motion to Reconsider—Notice of Motion—Validity of Ordinances.—Notice of a motion to reconsider the passage of an ordinance by a legislative body of a municipal government, which requires the approval of the mayor to give it force, has no other effect than to prevent the immediate transmission of such ordinance to the mayor for action thereon. If the motion to reconsider is not made at the next regular meeting, the notice is functus officio, and the ordinance so passed stands as the action of the body which passed it, and, on the adjournment of such meeting, should be transmitted. (a) The action of the general council of the city of Atlanta, in fixing January 7, 1901, as a day for the regular meeting of the aldermanic board, was, under its rules, had by a two-thirds vote. (b) The ordinance in controversy, granting a franchise to construct and operate a line of street railroad in certain streets, having been legally passed by the two legislative bodies of the city of Atlanta, and approved by the mayor in due time, it operates as a legal and valid consent of the city to the exercise of the powers conferred by law on the Atlanta Rapid-Transit Company, upon the terms incorporated in such ordinance.

Finding of Lower Court Sustained—Street Declared Public.—Under the evidence, the trial judge was fully warranted in ruling that Cherokee avenue was one of the public streets of the city of Atlanta.

Street Railways—Connecting Tracks—Contract Made by Part Owner—Interest of Other Part Owners.—Under the terms of the contract made by the two parties at interest, a connecting track of a street railway, to be made by one of them at Hunter street, with the tracks of the street railway on Whitehall street, which was authorized by the municipal authorities, is not in violation of any legal right of the other owner of an equal interest in, and right to use, such tracks.

Injunction—Dismissal of Application.—No error was committed in refusing the application for injunction.

(Syllabus by the Court.)

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Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Atlanta Railway & Power Company against the Atlanta Rapid-Transit Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Payne & Tye, King & Anderson, and L. W. Thomas, for plaintiff in error.

Brandon & Arkwright, Rosser & Carter, J. L. Hopkins & Sons, and King & Spalding, for defendant in error.

Bayliss et al. *v.* Newark & H. Traction Co.

(Court of Errors and Appeals of New Jersey, July 2, 1901.)

[49 Atl. Rep. 589.]

Street Railways—Raising Tracks above Street Grade—Interference by Mayor—Injunction.—The tracks of a street-railway company, required by ordinance to conform to the grades of the streets, were above the grade, and the mayor of the borough found employees of the company at work on the tracks, and was told by the foreman that they were raising the tracks, whereupon the mayor ordered him to desist: *held* not sufficient to authorize an injunction restraining the mayor and council from interfering with the work of the company on its tracks.

Appeal from court of chancery.

Bill by the Newark & Hackensack Traction Company against George Bayliss and others to restrain interference with work on complainant's tracks. From a decree making the injunction perpetual, the defendants appeal. Reversed.

Addison Ely, for appellants.

Charles D. Thompson, for respondent.

VOORHEES, J. The Newark & Hackensack Traction Company was operating a traction road on Belleville avenue, in North Arlington, under and by virtue of an ordinance of the borough passed December 16, A. D. 1896. This ordinance provided that the rails comprising the tracks of the company should be laid so as to conform to the surface of the avenue at the time they were laid, and should be raised or lowered, at the expense of the company, to conform to any alteration of the grade which might thereafter be made by the borough. On the 24th day of May, A. D. 1900, George Bayliss, the mayor of the borough, saw a body of men at work on the company's tracks on Belleville avenue. They had proceeded about four or five feet over the line dividing the town of Keraney from North Arlington, when he approached the foreman, and asked him what they were doing. He was informed by him "that they were raising the tracks through there." He notified the foreman that he could not proceed further with raising the tracks through the borough; that they were already above the surface of the street; and that he would not, as mayor of the borough, permit them to be raised to any higher elevation. The company then applied to the court of

chancery, and procured a rule to show cause, with a restraining order commanding the mayor and council to desist and refrain from interfering with the work of the company on their tracks in the borough. This injunction was afterwards made perpetual. The company had no further or greater authority in the avenuue than was granted to it by the ordinance. They were required under its terms to maintain the tracks so that they should conform to the surface of the avenue. It appears that the rails were at that time beyond the restrictions of the ordinance, and above the surface of the street, and the mayor was informed by the foreman in charge of the workmen that they were in the act of raising them still higher. As the executive officer of the borough, he directed them to stop the work, and forbade further raising of the tracks. No force or violence was used, and the mayor does not appear to have done any improper or unlawful act. He was justified, from the information he received, in forbidding further elevation of the tracks, and in ordering the work thereon to stop. The facts do not justify the interference of the court of chancery, and the injunction should be dissolved, and the bill dismissed.

City of Council Bluffs *v.* Omaha & C. B. St. Ry. & Bridge Co.

(*Supreme Court of Iowa, May 21, 1901.*)

[86 N. W. Rep. 222.]

Street Railways—Paving Street Intersections—City Not an Abutting Owner.—The words, "property owners abutting," in an ordinance providing that where railway tracks are laid on a street already paved the company shall pay the property owners abutting for the paving between the rails, do not apply to the city, as owner of the streets, so as to require the company to pay for paving at street intersections.

Appeal from superior court of Council Bluffs; E. E. Aylesworth, Judge.

December 26, 1891, plaintiff commenced this action, praying judgment against the defendants on three counts, as set forth in Exhibits A, B, and C. Exhibit A is for expenses paid by the city to replace Avenue A in the condition it was in previous to its occupancy by the defendants. Exhibit B is for paving between the tracks and one foot outside thereof at intersections where the street had been paved by the city previous to the time the defendants laid their second track thereon. Exhibit C is for paving between the tracks and one foot outside thereof, in front of city property, on streets where the defendants laid their second track after the streets had been paved by the city. The defendants answered, denying any liability, and, by consent of parties, the case was tried to the court upon an agreed statement of facts. The court found for the plaintiff on the claims made in Exhibit A and Exhibit C, and for the defendants on the claim made in Exhibit B, and rendered judgment accordingly. The plaintiff appeals

from the judgment against it on the claim made in Exhibit B. Affirmed.

S. B. Wadsworth, for appellant.

Wright & Baldwin, for appellees.

GIVEN, C. J. The only contention is as to the claim made in Exhibit B, and it is conceded that it rests upon the construction to be given to the last paragraph of section 3 of the ordinance of the city under which the defendants occupy its streets. That section, after making provision requiring the defendants to conform to the grades of streets, and to pave its track where the city paves, after track is laid, provides as follows: "Where the tracks are laid upon a street already paved, the company shall pay the property owners abutting for the paving between the rails and one foot outside thereof; and in laying its tracks said company shall restore said streets, whether paved or not, to as good condition as before the laying down of its tracks thereon, and shall conform to all grades, and keep water-ways and culverts in good repair at its own expense for the passage of water, along or across its tracks." The claim in Exhibit B is not for paving in front of city property, as in Exhibit C, but for paving intersections of streets. Counsel for the city contend that, the city having title to its streets, it is an abutting property owner whenever a street intersects that upon which defendants' track is laid. It is urged in argument that the ordinance stands as a contract between these parties, and that it was understood and intended that the defendants should pay for paving at intersections. True, the plaintiff city holds title to the streets within its limits, but not as owner, but for the public, for the uses and purposes authorized by law. It does not own the streets as it may own lots and buildings, and, as a general rule, cannot sell or convey the streets. If it had been intended to impose this liability on the defendants, it would not have been left to construction, but would have been plainly provided for. To say that the words "property owners abutting" were intended to apply to the city, as owner of its streets, is at variance with what is commonly understood, and foreign to what was intended. Affirmed.

Eggert *v.* Templeton et al.

(Supreme Court of Iowa, Feb. 5, 1901.)

[85 N. W. Rep. 19.]

Drains Ordered by City for Benefit of Private Property—City Not Liable for Cost of.—Where the committee on streets of a town ordered drain tiles, pursuant to a resolution of the town council granting a petition for an outlet to tile drains, so that cellars and lots in certain blocks might be properly drained, the drains being of benefit only to private property, and of no use for the drainage of the streets, the town was not liable therefor.

Same—Same—Ratification by Council—Instructions—Setting Aside Verdict.—Where there is no dispute but that certain tile were purchased and used by town officers, not for the purpose of improving

the streets or alleys, but for the sole purpose of draining private property, and the court charged the jury that if they found such to be the fact the town was not liable therefor, though the council attempted to ratify the purchase, it is the duty of the jury to obey such instructions, and find in accordance with the undisputed facts, and a verdict contrary thereto should be set aside.

Appeal from district court, Cedar county; W. H. Treichler, Judge.

Action at law to recover the reasonable value of certain drain tile furnished defendant town at its instance and request. Trial to a jury, verdict and judgment for plaintiff, and the town appeals. Reversed.

Preston & Moffitt, for appellant.

DEEMER, J. The committee on streets and alleys of the defendant town ordered the drain tile for which plaintiff seeks to recover. It was ordered pursuant to a resolution of the town council granting a petition for an outlet to tile drains, "so that cellars and lots in certain blocks might be properly drained." The drain in which it was used ran from the southeast corner of a certain block, diagonally across the street, to the block lying southeast of the one first mentioned. From that point it ran in a southeasterly direction across the adjoining block and an alley, to a creek, into which it emptied. It was constructed for the sole purpose of draining cellars, and was laid more than six feet below the surface. At the time it was constructed there was adequate surface drainage for the street, and this drain was not constructed to carry off surface water, except as it might find its way into adjoining cellars. These facts are practically without dispute.

The trial court gave the following instructions: "But if you fail to find that said tile was purchased or used for the purpose of improving or repairing the streets or alleys thereof, or if you find that the same was purchased and used for the sole purpose of draining private property, then said town is not liable, even though the council thereof may have subsequently undertaken to ratify the same. If you find from the evidence that the tile in question was permitted by the town of Bennett to be laid across its streets and alleys for the sole purpose of draining private property, then the same would not be a public improvement of the streets and alleys of said town, and it would not be liable therefor." The duty of the jury to follow these instructions is clear. Had it done so, it would have returned a verdict for the defendant. Instead of doing so, it found for the plaintiff. Defendant's motion for a new trial should have been sustained on this ground alone. Reversed.

City of Louisville *v.* Norris.

(*Court of Appeals of Kentucky, Oct. 31, 1901.*)

[64 S. W. Rep. 958.]

Construction of Sewer—Defect in Plan—Injury to Property—Liability of City.—A city is liable for injury to property resulting from the

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construction of a sewer according to a plan which is palpably bad, though the execution of the plan may have been skillful.

Same - Care and Maintenance—Instructions.—In an action against a city to recover damages for injury to property from the negligent construction of a sewer, it was proper to instruct the jury that "when the city undertakes to construct a sewer it is its duty to exercise ordinary care and skill to keep it in condition to carry off the water collected thereby from such rainfalls as may be reasonably expected to occur in the neighborhood to be drained by such sewer."

Same—Same—When Notice of Defective Condition Not Necessary.—Where the initial construction of a sewer by a city is manifestly defective, notice to the city of the defect is not a prerequisite to its liability for injury to property resulting therefrom.

Accrual of Right of Action—Limitation.—The right of action against a city for injury from the flooding of property by the negligent construction of a sewer accrues when the property is flooded, and limitation runs only from that date.

Appeal from circuit court, Jefferson county, common pleas division.

"To be officially reported."

Action by M. Norris against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant.

Samuel Kirby, for appellee.

O'REAR, J. This is an action to recover of the city for the negligent construction of certain sewers, by reason of which appellee's property was flooded and damaged. The questions are: (1) Is the building of sewers by a city a legislative act, for which it will not be liable, even if it be an imprudent one? (2) Does the five-year statute of limitation of this state apply from the date of the construction or from the date the injury is received?

1. Generally, a city will not be liable for error of judgment in its legislative body in doing a legislative act. Whether a necessity for a given improvement of a highway exists is clearly one for the legislative departments of the city to decide; also the character of the improvement is within the legislative discretion, subject to the qualification that the plan adopted must be one not so palpably inefficient as to indicate want of care, or to imply a failure to exercise judgment by the city governing body. So, when a municipality determines to change the natural order of things, by altering the surface drainage, and collecting it into artificial channels, it cannot fail to use ordinary good judgment in adopting the plan of the work, without liability to any injured thereby. If the plan adopted is palpably bad, it will not excuse the city from resulting damage to private property to show that the execution of the plan was skillful. Gould v. City of Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; McClure v. City of Red Wing, 28 Minn. 194, 9 N. W. 767; Teager v. City of Flemingsburg (Ky.) 60 S. W. 718. On this point the trial court instructed the jury thus: "When the city undertakes to construct a sewer, it is its duty to exercise ordinary care and

skill to keep it in condition to carry off the water collected thereby from such rainfalls as may be reasonably expected to occur in the neighborhood to be drained by such sewer." This application of the law on that subject is approved.

Appellant claims that, to be liable, the city must have had notice of the defects in the plan adopted by it, and that this notice should have been in the form of complaint by property owners after the defect had become apparent by experiment; in other words, that the city would not be liable for the first instance of damage, however heavy. The doctrine of notice invoked doubtless is that applying to cases where an improvement was properly made, but had afterwards become insufficient from accident, or sudden and unexpected change, without the knowledge of the city. But, where the initial construction is manifestly deficient for the purposes intended, —that is, in the language of the instruction given, was not such as "ordinary care and skill" would suggest in order to "carry off the water collected from such rainfalls as may be reasonably expected to occur in that neighborhood,"—notice need not be given the city. One must take notice of his own lack of care, and cannot rely upon being first warned of the dangers it threatens. Barton v. City of Syracuse, 36 N. Y. 54.

2. It being settled that the liability imposed under the foregoing was for the wrongful or negligent act of the city, constituting a nuisance (Wood, Nuis. § 385), the complaining lot owner was not compelled to sue till the damage had been done. His action was for damages sustained at the date of the flooding of his property. Limitation should date from that event. City of Louisville v. O'Malley (Ky.) 53 S. W. 287.

The judgment is affirmed.

Angus *v.* City of Hartford.
McKone *v.* Same.

(Supreme Court of Errors of Connecticut, May 29, 1901.)

[49 Atl. Rep. 192.]

Street Improvements—Property Owners—Assessments—Necessity of Notice—Validity.—Where a vote was passed by the proper body for the paving of a street between certain points after publication of notice thereof in a newspaper, and by written or printed notice mailed to the property owners on the street 10 days before any action was taken, as required by Sp. Laws 1895, p. 617, §§ 1, 2, as amended by Sp. Laws 1899, p. 504, § 1, but thereafter such vote was reconsidered and rescinded, and a subsequent vote was passed ordering the paving of such street for a greater distance without notice by publication or mail to property owners, the assessment for such paving on the property benefited was void, since, as the second vote related to a different taxing district, affecting different persons, giving notice before passing the second vote was an essential requisite, the omission of which made it of no binding force.

Cases reserved from court of common pleas, Hartford county; William S. Case, Judge.

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Suits by William Angus and Patrick McKone against the city of Hartford to restrain enforcement of an improvement assessment. Demurrers to the complaints, and question as to judgment reserved for the advice of the supreme court of errors. Demurrers overruled.

Arthur L. Shipman, for plaintiff Angus.

Edward L. Smith and John J. McKone, for plaintiff McKone.

William J. McConville, for defendant.

ANDREWS, C. J. (after stating the facts). The plaintiff is the owner of land abutting on Capitol avenue, in Hartford. The city paved that street with asphalt, and made an assessment for benefits upon the abutting lands, and has caused a lien to be filed in the town records of the town of Hartford upon and against the land of the plaintiff to secure the payment of his said assessment. The complaint avers that the assessment is illegal and void, and claims an injunction to restrain any steps to collect or to foreclose the said lien. The city demurred to the complaint. The question of what judgment shall be rendered upon the demurrer is reserved for the advice of this court.

The complaint alleges two distinct grounds of action:

1. That the assessment was made under the special act of 1895 (Sp. Acts 1895, p. 617, as amended by Sp. Acts 1899, p. 504), and the city apportioned the amount of benefits assessed between the persons benefited upon the basis of the number of feet of land owned by each abutting proprietor in proportion to the entire frontage upon that portion of the street paved, and that the plaintiff had no opportunity to be heard in reference to the benefits assessed upon his land, and was not in fact heard. It also alleges as a fact the conclusion of law that the special act authorizes an assessment in such manner, and the plaintiff's grievance is based on this assumption. The special act is an amendment to the city charter, and must be construed in view of the existing charter provisions as to the assessment of betterments. While it may to some extent modify those provisions, we incline to think it substantially leaves them in force and applicable to the assessment for street pavements authorized by the act. The decisive questions as to this ground of action are not presented by the complaint and demurrer with requisite clearness. Before we were asked to pass judgment by way of advice, the complaint should have been reformed, the allegations of law stricken out, and those of fact made more definite. This is immaterial, however, inasmuch as our opinion upon the other ground of action must finally dispose of this case.

2. That the vote ordering the street in question to be paved, and the vote assessing the abutting property owners, including the plaintiff, were passed without giving the notice to property owners interested required by the special act. The complaint avers that the board of street commissioners of

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Hartford, which in this connection means the city itself, on or about the 14th day of February, 1900, selected Capitol avenue, from Main street to the Park river, to be paved with asphalt during the season of 1900; that notice was given by publication in the daily newspapers of the city, and, so far as was practicable, by written notices addressed to the property owners interested, in their own places of abode, and deposited in the post office, postage paid, at least 10 days before any action was taken, as by law provided; that on June 13, 1900, the street commissioners passed votes ordering Capitol avenue to be paved with asphalt from Main street to Park river, and assessing two-thirds of the expense of said pavement upon the abutting property owners; that on or about June 20, 1900, the said votes of June 13th were reconsidered and rescinded, and that without any further notice by publication, or written or printed notice as above set out, votes were passed ordering Capitol avenue to be paved from the west line of Lafayette street to Park river; that on or about June 27, 1900, these votes of June 20th were submitted to and approved by the court of common council; that on or about November 26, 1900, the city made an assessment upon the plaintiff's land to pay a portion of the cost of said pavement, to wit, $459.82. These averments are all admitted by the demurrer, and, because of these averments, we think the demurrer should be overruled. It was competent, without any doubt, for the street commissioners on June 13, 1900, to pass votes ordering Capitol avenue to be paved from Main street to the Park river, and assessing two-thirds of the expense on the abutting landowners. A taxing district had been fixed, and the persons who were or ought to be subject to the assessment had been made known, and due notice had been given to all such persons. These votes, however, were on June 20th reconsidered and rescinded. The whole matter then was in the condition it was before any votes at all had been made. Subsequent votes ordering Capitol avenue to be paved from the west line of Lafayette street to Park river were passed without notice by publication or by mail to the plaintiff. These votes related to a different taxing district from the one embraced by the votes of June 13th. Different persons were affected by the assessment. The apportionment of the benefits and expenses was different. It was a new matter, —in legal contemplation, different from the one dealt with by the former votes. The charter required the board of street commissioners to give notice before passing these votes just as much as before the passage of the votes of the 13th, and, as they omitted to give any notice, we think they omitted an essential requisite, and that these votes are without any binding force. The assessment is void. The court of common pleas is advised to overrule the demurrer. The same advice is given in the McKone case. The other judges concurred.

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Parrotte *v.* City of Omaha et al.

(Supreme Court of Nebraska, Dec. 4, 1900.)

[84 N. W. Rep. 602.]

Opening Street—Special Taxation.—The mayor and council of cities of the metropolitan class have authority to raise, by special taxation of property benefited, a fund to defray the cost and expense of opening a street within the corporate limits.

Same—Same—Injunction.—A party seeking to enjoin the collection of a special tax has the burden of showing that the taxing power was not lawfully exercised; or that there are fatal infirmities in the proceedings leading up to the tax levy.

(Syllabus by the Court.)

Error to district court, Douglas county; Powell, Judge.

Action by Mary H. Parrotte and others against the city of Omaha and others. Judgment for defendants, and Parrotte brings error. Affirmed.

Francis G. Hamer, for plaintiff in error.

W. J. Connell, for defendants in error.

SULLIVAN, J. The constitution (article 9, § 6) provides that "the legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited." The Omaha charter, enacted in pursuance of this provision of the fundamental law, conferred upon the mayor and council the authority which they assumed to exercise in opening Twenty-Ninth avenue, and in raising a fund with which to defray the cost and expense of the improvement. It may be, as counsel claims, that there are fatal infirmities in the proceedings leading up to the tax levy; but, if so, the record does not disclose them. The mayor and council had power to levy and collect the tax in question, and in cases of this kind the burden is on the plaintiff to show that such power was not lawfully exercised. The judgment is affirmed.

Meyer *v.* City of Covington.

(Court of Appeals of Kentucky, Sept. 25, 1901.)

[64 S. W. Rep. 444.]

Judgment for Cost of Street Improvement—Reversal—Amended Petition—Curative Ordinance.—A judgment enforcing a lien for the cost of a street improvement having been reversed because the lot sought to be subjected was not sufficiently described in the petition on the return of the case, the lower court properly permitted plaintiff to file an amended petition specifically describing the lot and setting out an amended ordinance curing some supposed defects in the previous assessment.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Action by the city of Covington against John Meyer to enforce a lien for the cost of a street improvement. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Dial, for appellant.

F. J. Hanlon, for appellee.

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O'REAR, J. This case was here on appeal once before, and decided May 10, 1898. 45 S. W. 769. The action was by the city of Covington to enforce a lien against a lot of appellant in the city named for certain street improvements, appellant's lot being an abutting property on said street. The former judgment was reversed, because: First. It gave personal judgment against appellant for the amount of the improvement. This was held to be unconstitutional. Second. Because the lot was not sufficiently described to identify it by the description. Third. Because the terms of sale were not stated in the judgment. All the other defenses relied upon by appellant were decided against him. On return of the case an amended petition was tendered by the city, in which it set out an accurate and ample description of the lot sought to be subjected, and in which it furthermore set out an amended ordinance of the city curing some supposed defects in the previous assessment. The court permitted this amendment to be filed, and, we think, properly so. Appellant demurred to the amended petition, and, his demurrer having been overruled, he failed to plead to it. Thereupon the court rendered the judgment enforcing appellee's lien upon the property for the amount of the improvement assessed against it, and directing a sale of the property to satisfy the lien adjudged. The judgment conformed in every particular to the requirements set forth in the previous opinion herein, and, there being no error manifest to us in the record, the judgment is affirmed.

State (Seaman, Prosecutor) *v.* City of Camden.

(*Supreme Court of New Jersey, Aug. 9, 1901.*)

[49 Atl. Rep. 977.]

Sewer Assessments—Future Benefits—Lien of Assessments.—By virtue of the provisions of the act of 1895, concerning the making and collecting of assessments for benefits conferred by the construction of sewers and drains, when the benefit to property accruing from the construction of a trunk sewer is prospective only, depending upon the construction of another and connecting sewer or drain, not yet built, the assessment upon such property is to be made at the same time, and together with that made upon property presently benefited thereby, but the lien of such assessment does not come into existence until the connecting sewer or drain is built.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Abraham C. Seaman, against the city of Camden, to review an assessment for the benefit of constructing a trunk sewer. Assessment affirmed.

Argued February term, 1901, before GUMMERE and FORT, JJ.

John W. Wescott, for prosecutor.

H. M. Snyder, Jr., for defendant.

GUMMERE, J. Pursuant to the authority conferred by the provisions of a supplement to "An act providing for the

formation, establishment, and government of towns" (P. L. 1898, p. 471), the town of Stockton, in the county of Camden, passed an ordinance providing for the construction of a trunk sewer in and along Federal street, from Cooper avenue to Cooper's creek. While this sewer was in process of construction, the town of Stockton was annexed to the city of Camden by an act of the legislature approved March 24, 1899 (P. L. 1899, p. 355). By force of this statute, and of the provisions of an act of the legislature passed March 30, 1888 (Gen. St. p. 2245), the town of Stockton became an integral part of the city of Camden, and subject to the provisions of the charter of that city and its supplement. Miller v. Greenwalt, 64 N. J. Law, 197, 44 Atl. 880; on error, Id., 64 N. J. Law, 722, 46 Atl. 1100. After the construction of the sewer had been completed the city engineer of Camden, in accordance with the requirements of the city charter, and of the general laws regulating this subject, proceeded to assess the cost of this public work upon the property benefited thereby, to the extent of the benefit received. Besides assessing the property benefited in præsenti by the construction of the sewer, the city engineer also assessed lands not now benefited, but which lie within the area or district which will ultimately be drained by this trunk sewer. The prosecutor is the owner of lands lying within this district, and which will not be benefited by this work unless and until a lateral sewer is constructed, by which the drainage and sewage from such lands may be vented into the trunk sewer. His claim is that, as no benefit will accrue to his property until it is connected with the trunk sewer by a lateral branch, an assessment which precedes such connection is invalid. By virtue of the provisions of section 2 of "An act concerning the making and collecting of assessments for benefits conferred by the construction of sewers and drains," approved February 19, 1895 (P. L. 1895, p. 95), when the benefit to the property accruing from the construction of a trunk sewer "is prospective only, depending upon the construction of another and connecting sewer or drain not yet built," the assessment upon such property is to be made at the same time, and together with, that made upon property presently benefited by the construction thereof; but the lien of such assessment does not come into existence until the connecting sewer or drain is built, and interest thereon does not begin to run until the confirmation of the assessment for the connecting sewer. Vreeland v. Bayonne, 60 N. J. Law, 169, 37 Atl. 737. The assessment under review was made in conformity to the provisions of the act of 1895, as construed by the court of errors in the case cited, and should be affirmed.

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Ramsey County *v.* Robert P. Lewis Co.*

(Supreme Court of Minnesota, June 18, 1901.)

[86 N. W. Rep. 611.]

Ordinance—Water Tax—Frontage Rule.—Sp. Laws 1885, c. 10, §§ 26, 27 (St. Paul City Charter), authorize an assessment on every lot in the city of St. Paul of an annual frontage tax, where water pipes are laid in front of said lot, for the use of the water commissioners: *held*, that the statute is not unconstitutional, as in violation of the fourteenth amendment of the federal constitution, as a taking of property without due process of law.

On rehearing. Reversed, and judgment of district court affirmed.

For former opinion, see 85 N. W. 207.

LEWIS, J. The only question before the court in this case was the bearing of the federal constitution upon sections 26, 27, c. 10, Sp. Laws 1885. The decision formerly reached by this court was based wholly upon what were believed to be the principles announced in the case of Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. Those principles are that the exaction from private property of the cost of public improvements in substantial excess of the special benefits accruing is, to the extent of such excess, a taking of property under the guise of taxation, without compensation, and, further, that when the principle of assessment adopted by the legislature is without reference to the benefits and a just and equal distribution of the burden, no provision having been made for a hearing or review by the property owners, the act is void. Or, as expressed in the mandate issued in that case: "The judgment of the circuit court enjoining the assessment is affirmed upon the ground that the assessment was under a rule which excluded any inquiry as to the special benefits, and the necessary operation of which was, to the extent of the cost of opening the street in question, after special benefits accruing to the abutting property therefrom, to take private property for public use without compensation." The principles thus announced do not seem to be in conflict with those declared in Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, and Spencer v. Merchant, 125 U.S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763. In those and similar cases the legislative power was not recognized as arbitrary and without limit, but those cases rested upon the theory that the legislature does actually exercise its judgment with reference to the subject, which it might otherwise delegate to a proper body. It logically follows, in a case where the rule of assessment provided is arbitrary, without regard to benefits and without the right of review, that the act so providing is in contravention of the federal constitution. Tested by those principles, we held that the water-frontage tax could not be sustained; and now, after a careful reconsideration and review of the cases, were

*For former opinion, see ante, p. 50.

the question one of final jurisdiction in this court, we feel that we should adhere to the view expressed in the former opinion. But in the recent case of French v. Paving Co., 21 Sup. Ct. 625, 45 L. Ed. —, and other cases concurrently decided, the federal supreme court has attempted to qualify and limit those principles as applied in Village of Norwood v. Baker. While it does not appear that the court has directly denied the soundness of the rule announced, yet the purpose seems to be, in its later expressions, to hold that the principle will not apply when in conflict with the systems of taxation as adopted by a state, unless, in some special case, peculiar and extraordinary hardship is the result. In other words, it is not the principle or rule of assessment which is the test of the validity of the state act, but, rather, the effect of the application of the rule in particular cases. It may be a sound rule in one case, and not in another. It would be useless at this time to further attempt to define the position of the federal court as expressed in its later decisions. It is sufficient to say that we are in doubt as to the effect of its holdings. Our state constitution authorizes the special assessments provided by the statute, and such statute has been held valid, under the constitutional provision, by this court in State v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108. It is possible that this fact may cause the federal court to sustain the statute, upon the theory that it is a system adopted by the state, and that the result of such an assessment cannot be extraordinary or of such unusual hardship as to come within the limitation applied in Village of Norwood v. Baker. The views of the court, however, have not been expressed with sufficient clearness to warrant us in assuming that our understanding of its decision in Village of Norwood v. Baker, and our former application of it to the state act, would now be sustained by that court. We have, therefore, decided to reverse our former decision; and we are influenced in this conclusion somewhat by the fact that the property owner may cause our conclusion to be reviewed by the proper final tribunal, whereas such privilege would be denied the city were the former ruling adhered to. The decision heretofore filed is reversed, and the order of the trial court affirmed.

START, C. J. I concur in the result, on the ground that the case is ruled by State v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, and Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943.

Wingate et al. *v.* City of Astoria et al.

(*Supreme Court of Oregon.*)

[65 Pac. Rep. 982.]

Street Improvement—Collection of Assessments—Injunction by Property Owner—Estoppel.—Where municipal authorities have jurisdiction to improve a street, a property owner, who, with knowledge of the improvement, makes no objection until after the work is completed, cannot enjoin the collection of the assessment on the ground

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that the estimates and plans were insufficient, or that any of the proceedings have not been regular.

Same—Same—Same—Same.—Where a city council has attempted to establish the grade of a street, mere irregularities, or even invalidity, in the proceedings, not amounting to a want of jurisdiction, would not affect its power to subsequently improve the street according to such grade, or afford ground for an injunction by a property owner to restrain the collection of an assessment for such improvement after the work has been completed.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Action by G. Wingate and others against the city of Astoria and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Geo. Noland and J. Q. A. Bowlby, for appellants.

A. M. Smith and C. W. Fulton, for respondents.

BEAN, C. J. This is a suit brought by the owners of certain real property abutting on Grand avenue, in the city of Astoria, to restrain the execution of a warrant for the sale thereof for delinquent street assessments and was commenced after the work had been completed, and accepted by the city. The plaintiffs made no objection whatever while the work was in progress, but it is now insisted that the entire proceedings were invalid, because: (1) The grade of the street had not been legally established prior to the proceedings for its improvement; (2) the estimates, plans, and specifications for the work, which the charter requires to be filed with the auditor and police judge, were insufficient; (3) the record does not show that all the members of the board of equalization were present at the meeting, held after public notice, as required by the charter, for the purpose of reviewing and correcting the action of the board of assessors in apportioning the cost of the improvement to the property within the assessment district; and (4) the local assessments were not in fact made according to benefits. So far as the last three objections are concerned, it is sufficient to say that they do not go to the jurisdiction of the council to make the improvement, and therefore cannot be used as the basis of a suit for an injunction to restrain the collection of the assessment after the street has been improved. It is the settled law of this state, supported by the weight of authority, that, where the municipal authorities have jurisdiction to improve a street, a property owner, who, with knowledge of such improvement, makes no objection until after the work has been completed, cannot enjoin the collection of the assessment on the ground that the proceedings have not been regular. Wilson v. City of Salem, 24 Or. 504, 34 Pac. 9, 691; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978; Strout v. City of Portland, 26 Or. 294, 38 Pac. 126; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92; Elliott, Roads & S. (2d Ed.) § 589. In support of the other objection it is urged that the establishment of the grade of a street is necessary before any proceedings are had or taken for its improvement at the expense of the

property owners, and that, unless such grade is established, the council is without jurisdiction to proceed with the improvement. In July, 1891, in pursuance of the authority vested in it by the charter, the council passed an ordinance establishing the grade of what was then Seventh street, but is now Grand avenue. It is contended, however, that the ordinance is void, because it was approved by the president of the council at a time when there was a vacancy in the office of mayor (Babbidge v. City of Astoria, 25 Or. 417, 36 Pac. 291, 42 Am. St. Rep. 796), and hence no grade was ever legally established. There is no provision in the charter making the establishment of a grade a condition precedent to the right or power of the council to improve the street, or prohibiting such improvement before the grade is established. If any such requirement is to be found therein, it is by implication, not by direct provision. But it is unnecessary for us to examine that question at this time, for, even if it be conceded that the charter contemplates that the grade of a street shall be established before the improvement is begun, and that proceedings for the improvement prior thereto, upon seasonable objection and in an appropriate proceeding, would be held invalid, as in State v. District Court of Ramsey Co., 44 Minn. 244, 46 N. W. 349; State v. Judges of District Court, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122,—we are clearly of the opinion that where, as in this case, the council has attempted to establish the grade, mere irregularity, or even invalidity, in the proceedings, not amounting to a want of jurisdiction, would not affect its power to subsequently improve the street according to such grade, or afford ground for an injunction by a property owner to restrain the collection of an assessment for such improvement after the work had been completed.

City of Scranton *v.* Koehler.

(Supreme Court of Pennsylvania, July 17, 1901.)

[49 Atl. Rep. 792.]

Local Assessments—Front-Foot Rule.—Where the petition for the paving of a street is as a whole, and it is so done, the assessment of the abutting property by the front-foot rule, without regard to the fact that for part of the distance there are street-railway tracks, paving between which is paid for by the company, is valid.

Appeal from superior court.

Action by the city of Scranton against Henry T. Koehler. From judgment of the superior court affirming judgment for plaintiff for less than claimed, it appeals. Reversed.

A. A. Vosburg, City Sol., and D. J. Davis, Asst. City Sol., for appellant.

P. W. Stokes and I. H. Burns, for appellee.

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Vrana et al. *v.* City of St. Louis.

(*Supreme Court of Missouri, Division No. 2, June 28, 1901.*)

[64 S. W. Rep. 180.]

Local Assessments—Ultra Vires Contract with Dedicator of Street to Exempt Certain Lots.—Where plaintiff's grantor dedicated land to the city for streets, an express provision that proprietors of certain lots should not be assessed for special benefits accruing from the extension of streets was without the power of the city and void.

Appeal from St. Louis circuit court; L. B. Valliant, Judge.

Suit for an injunction by Anna Vrana and others against the city of St. Louis. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

Hainer & Hodgdon, for appellants.

B. Schnurmacher and Chas C. Allen, for respondent.

GANTT, J. Appellants submit the question, can the city accept the streets and alleys dedicated by Thomas Allen, and disregard the conditions imposed by him in the dedication? The purpose of the bill in this case is to have the court decree plaintiffs' property exempt from the special assessments for the opening of Iowa avenue from the northern line of Thomas Allen's Western addition northward to Lafayette avenue. It is insisted that the city, by accepting Allen's dedication of the streets and alleys in said addition, agreed to exempt the lots in said addition from any of the cost of extending or widening said streets or alleys. The circuit court dismissed the bill, and plaintiffs appeal. * * *

The city was without power to agree to exempt the lots in Allen's Western addition either from general taxes or special assessments, because no such power is vested in it by its charter, and unless this power is granted it does not exist. This must now be regarded as settled law in this state. It was so ruled in State v. Hannibal & St. J. R. Co., 75 Mo. 208, as to an attempted exemption by the city of Hannibal as to municipal taxes, in order to prevent a removal of the general offices and machine shops of the railroad company. The reasoning of Sherwood, C. J., in that case, leaves nothing to be added, and decides the principle involved in this case.

City of Harrisburg *v.* McPherran.

(*Supreme Court of Pennsylvania, July 17, 1901.*)

[49 Atl. Rep. 988.]

Local Assessments—Front-Foot Rule—Due Process.—Act May 23, 1889 (P. L. 277), authorizing the cost of street paving to be assessed on the abutting property by the foot-front rule, does not, in the case of original paving in the built-up portion of a city, violate any constitutional provision against the taking of property without due process of law, though there is no prior hearing to ascertain that the special benefits are equal to the cost of improvement.

Appeal from superior court.

Proceeding by the city of Harrisburg against John P. Mc-

Pherran to enforce an assessment for street paving. From a judgment of the superior court affirming a judgment of the court of common pleas of Dauphin county for plaintiff, defendant appeals. Affirmed.

L. D. Gilbert and Wm. M. Hargest, for appellant.

C. H. Bergner, for appellee.

POTTER, J. The right to adopt the foot-front rule in assessing the cost of street paving in Pennsylvania must be regarded as definitely settled. It is not to be considered as an assessment, irrespective of benefits conferred, when it is applied to the original paving of a street in the built-up portion of a city. Under such circumstances, the improvement is manifestly a special benefit to the abutting properties. It could hardly have been urged that the question was an open one, had it not been for the opinion of the supreme court of the United States in the case of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, which was supposed to be in conflict with the rule. But the very careful consideration of that decision by Judge Simonton, in the present case, filed in the trial court, shows that the principles upon which Norwood v. Baker were decided do not, when properly understood, run counter to our own decisions. In that case there was a taking of private property for a public purpose, under the power of eminent domain, not only without compensation, but, further than that, the defendant was required to pay for the costs of the proceedings. Clearly, that was a very different procedure from that now under review. The same discriminating study was given to the opinion in Norwood v. Baker by the learned and conscientious president judge of the superior court, who states his conclusion as follows: "On a hasty reading, it might seem that the court meant that the foot-front rule, whenever and wherever applied, is necessarily a rule or mode of assessment which excludes from consideration special benefits to the properties assessed. We do not so interpret the decision. On the contrary, we think it is apparent from the opinion that the thing condemned was the arbitrary assessment of the whole cost of an improvement upon abutting properties, whether such properties are especially benefited or not, to the extent of the cost, and without regard to that consideration." That the meaning of the supreme court of the United States was thus properly apprehended, and its effect correctly applied to the present case, both by the trial court and the superior court, is fully demonstrated by the opinion of the United States supreme court in Wight v. Davidson (filed April 29, 1901) 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. —, in which it is stated that the interpretation of Norwood v. Baker, in which "the limits of assessment on a private owner of property is the value of the special benefit which has accrued to him from the public improvement adjacent to his property," was a misconception of the meaning and effect of that decision. And in French v.

Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. —, filed the same day, the supreme court of the United States enters an even more emphatic disclaimer against the principle sought to be deduced from Norwood v. Baker, viz. that the cost of a local improvement cannot be assessed against abutting property according to frontage unless the law under which the improvement is made provides for a preliminary hearing as to the benefits to be derived by the property to be assessed. This doctrine is repudiated in the statement, "But we agree with the supreme court of Missouri in its view that such is not the necessary legal import of the decision in Norwood v. Baker." The superior court and the court below were therefore clearly right in holding that Norwood v. Baker was decided upon its own facts alone, and that it also involved the question of eminent domain. There seems to have been a great difference of opinion as to the real meaning of the decision, but all doubt is now set at rest by the statement of the supreme court of the United States itself. The facts of the case of French v. Paving Co., last cited, are so nearly in line with those of the present case as to make them particularly applicable. Those facts are thus stated by the court: "The work done consisted of paving with asphaltum the roadway of Forest avenue, in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of half a mile. Forest avenue is one of the oldest and best-improved residence streets in the city, and all of the lots abutting thereon front the street, and extend back therefrom uniformly to the depth of an ordinary city lot, to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street, as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvements." The cost of the pavement was apportioned and charged against the abutting property owners, according to the foot-front rule. This method of assessment was approved by the supreme court of the United States, with the statement that it was "an orderly procedure, under a scheme of local improvements prescribed by the legislature, and approved by the courts of the state, as consistent with constitutional principles." So far, therefore, as the federal question is concerned in the present contention, there seems to be nothing left upon which the appellant can stand. The assignments of error are all overruled, and the judgment is affirmed.

City of Scranton *v.* Levers.

(*Supreme Court of Pennsylvania, July 17, 1901.*)

[49 Atl. Rep. 980.]

Sewer Assessments—Compliance with Statute—Affidavit of Defense.—A good defense on the facts is presented to the claim of a city for

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expense of constructing sewer in front of defendant's property by an affidavit of defense, alleging that the claim was under the act of 1889 (P. L. 312), requiring the assessments to be equal on all the front feet of the lands along which the sewer runs, but that a large proportion of the land liable to assessment for the sewer was not assessed.

Appeal from court of common pleas, Lackawanna county.

Proceeding by the city of Scranton against Hannah Levers. Judgment for want of sufficient affidavit of defense was refused, and plaintiff appeals. Affirmed.

A. A. Vosburg, City Sol., and D. J. Davis, Asst. City Sol., for appellant.

I. H. Burns, for appellee.

MITCHELL, J. The city of Scranton having filed a claim for the expense of a sewer in front of defendant's property, the latter set forth in her affidavit of defense that the claim was made under the act of 1889, by which the assessments are required to be "equal upon all the front feet of the lands along which the sewer runs," but that in fact a large proportion of the land liable to assessment in front of which this sewer runs was not assessed at all; wherefore the assessment on which the claim was founded was illegal and void. P. L. 1889, p. 312, § 1. The provision of the act of 1889 is not set forth with verbal accuracy, but with substantial correctness, and, as the fact averred as to the omission of assessable property on the line of the sewer must be taken as true upon the rule for judgment, the affidavit set up a sufficient defense. The court below so held, and discharged the rule. But the learned judge, having some views of his own on the subject of foot-front assessments, subsequently added a postscript to his opinion, in which, referring to Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, he expresses the view that the case of Michener v. City of Philadelphia, 118 Pa. 535, 12 Atl. 174, is deprived of its authority, and that assessments by the foot-front rule, without reference to actual benefits in the particular case, are unconstitutional. On this basis the counsel for the city have made an argument in favor of the constitutionality of the rule in general and the provisions of the act of 1889. It will be time enough to decide those questions when they come regularly before us. In the present case the affidavit set up a good defense on the facts, and on it judgment was properly refused. Judgment affirmed and procedendo awarded.

McAboy *v.* Gosnell et al.

(*Court of Appeals of Kentucky, Oct. 30, 1901.*)

[64 S. W. Rep. 961.]

Street Improvements—Enforcement of Assessment Liens—Pleading.—In an action to enforce a lien for the cost of a street improvement, as there was no sufficient averment of the contract, or of the notice of inspection, or of the inspection thereunder, and no proper attestation of the supposed copies of the contract, ordinance, and apportionment, the petition was fatally defective.

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Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by George W. Gosnell and another against Thomas McAboy to enforce a lien for the cost of a street improvement. Judgment for plaintiffs, and defendant appeals. Reversed.

O. H. Harrison, for appellant.

William Furlong, for appellees.

DU RELLE, J. This is an appeal from a judgment of the Jefferson circuit court adjudging appellees a lien upon the lot of land of appellant for the payment of an apportionment warrant for the improvement of an alley. A general demurrer to the petition was filed, and, without argument, overruled. Several questions presented by the argument in this court have been already passed upon in the case of Richardson v. Mehler (recently decided) 63 S. W. 957,—that the ordinance is void; that section 2838, Ky. St., is unconstitutional, because special or local legislation; and that the contract under which the work was done was void because of the ordinance requiring a $100 license as a prerequisite to the consideration of the bid made by any bidder. But the petition appears to be fatally defective in a number of respects. There is no sufficient averment of the contract, or of what was thereby undertaken to be done. There is no proper averment of the notice of inspection of the work done, or of the inspection thereunder. In a number of other respects the petition, if not actually defective, is exceedingly vague. Nor is there a proper attestation of the supposed copies of the contract, ordinance, and apportionment. These matters, however, it is not necessary to consider, as the judgment must be reversed and the cause remanded, with directions to set aside the judgment and sustain the demurrer to the petition, and for further proceedings consistent herewith.

City of Louisville *v.* Tyler.

(*Court of Appeals of Kentucky, Nov. 20, 1901.*)

[65 S. W. Rep. 125.]

Local Assessments—Cost of Curbing as Part of Reconstruction of Carriageway.—Ky. St. § 2835, providing that "the cost of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front feet as owned by the parties, respectively, fronting said improvement, except that each corner lot will pay the cost of its sidewalk intersection," applies only when a sidewalk, including curbing, is either constructed or reconstructed; and therefore, where no construction of sidewalk is provided for, but the ordinance and contract provide for an improvement of the carriageway "by grading, curbing, and paving," the curbing is a part of the improvement of the carriageway, and, if the work is reconstruction, must be done at the cost of the city.

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 64 S. W. 415.

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DU RELLE, J. A new question is presented by petition for rehearing. By the act for the government of cities of the first class (section 2835, Ky. St.) it is provided: "The cost of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front feet as owned by the parties, respectively, fronting said improvement, except that each corner lot will pay the cost of its sidewalk intersection." The ordinance and contract under which the improvement sued for in this case was made included curbing, and it is therefore insisted on behalf of the city that the judgment must be reversed as to the cost of the curbing, although, as decided by the court, the work was work of reconstruction. There is some apparent conflict between the section quoted and section 2833, the latter part of which was introduced for the first time in the act of March 19, 1898: "When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works according to the number of feet owned by them respectively; and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue and not of the sidewalk." It therefore appears that, at least since the adoption of the new act, it was not by the legislature considered essential that curbing should be regarded as part of the sidewalk, nor that it must invariably be apportioned in proportion to the number of front feet of the abutting property, for the new section requires that, when laid down in connection with the original construction of a street, it shall be treated as a part of the cost of the roadway, and apportioned in proportion to the number of square feet in the quarter squares adjacent to the improvement; and, independently of the legislative construction by the act of 1898, the court has reached the conclusion that section 2835 applies only when a sidewalk, including curbing, is either constructed or reconstructed; and that where, as in the case at bar, there is no construction of sidewalk provided for, but the ordinance and contract provide for an improvement of the carriageway "by grading, curbing, and paving," etc., the curbing is a part of the improvement of the carriageway, and, if the work is reconstruction, must be done at the cost of the city.

The petition is therefore overruled.

This response applies also to the petition in the case of Railroad Co. v. Nehan (Ky.) 64 S. W. 457.

Eureka Hill Min. Co. *v.* City of Eureka.

(Supreme Court of Utah, Dec. 6, 1900.)

[63 Pac. Rep. 654.]

Taxation—Situs of Proceeds of Mine Partly within City.—The net proceeds of a mine are taxable at the place where the ores are taken

to the surface through the main workings, and, being personal property, should be taxed as other personalty.
(Syllabus by the Court.)

Appeal from district court, Juab county; E. V. Higgins, Judge.

Action by the Eureka Hill Mining Company against the city of Eureka. Judgment for defendant, and plaintiff appeals. Affirmed.

Bennett, Harkness, Howat, Sutherland & Van Cott, for appellant.

N. A. Robertson, for respondent.

BASKIN, J. When the net proceeds of a mine are derived from veins or deposits of ore, the apexes of which and the surface ground of the mining claim are within the boundaries of a county, city, or town, we have no doubt that under the revenue act such proceeds are taxable therein, notwithstanding a portion or even all the ore may have been extracted from the mine beneath the surface on the dip, outside of the boundaries of the county, city, or town. The situs of such a mine, for the purposes of taxation, is not determined by the place at which the ores are brought to the surface, but by the place in which the apexes of the veins or deposits of ore, and the surface covering their apexes, are situated.

BARTCH, C. J., and MINER, J. We concur in the affirmance of the judgment, but dissent from the holding contained in the opinion with reference to the place where the net proceeds of the mine are taxable. We agree with the trial court that the net proceeds of the appellant's mine, both within and without the city of Eureka, are taxable at the place where the ores are taken to the surface through the main shaft of appellant's mine, which is within the limits of the respondent city. The net proceeds, being personal property, should be taxed in the city of Eureka, and as other personal property.

Frost *v.* Board of Review of City of Oskaloosa.

(*Supreme Court of Iowa, April 12, 1901.*)

[85 N. W. Rep. 770.]

Appeal from Assessment—City Council Acting as Board of Review—Improper Service of Notice of Appeal—Statutes.—Plaintiff appealed from the assessment of the defendant city council acting as a board of review, and the acceptance of notice of appeal, signed after the board's adjournment, was by "J. P. Seibert, Chairman." Code, § 1370, makes the city council the reviewing board therein, and section 1373 provides that an appeal may be taken from the action of the board by a written notice to the chairman or presiding officer of the reviewing board. Code, § 658, prescribes that the mayor shall be the presiding officer of the council, and that the selection of a chairman pro tem. to act in the mayor's absence shall be recorded. At the time plaintiff's assessment was reviewed, the mayor was not in the room, but in his adjoining office, and the meeting was presided over by J. P. Seibert, who had previously been elected chairman pro tem., though such election had never been recorded: *held*, that the

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notice of appeal was not properly served within the statute, the mayor being the person on whom service should have been made; and hence the appeal was properly dismissed.

Appeal from district court, Mahaska county; A. R. Dewey, Judge.

Appeal from an order of the district court dismissing plaintiff's appeal from the action of the defendant in the matter of his assessment. Affirmed.

Liston McMillen, for appellant.

B. W. Preston, for appellee.

SHERWIN, J. At the time the matter of plaintiff's assessment was before the defendant, B. V. Seevers was the mayor of Oskaloosa. The sessions of the board were held in the mayor's office, which consisted of a front and rear rooms. The mayor was present at the opening of each session. He directed the roll call, and swore the witnesses when they were sworn at all. He did not remain in the room with the board all the time, but was either there or in his front room when the board was in session. He was not actually in the room when plaintiff's assessment was under consideration, and the plaintiff claims that J. P. Seibert, a member of the city council, was acting as chairman of the defendant board at the time, by virtue of his selection some time before as mayor pro tem. Acceptance of service of the notice of appeal from the action of the board was signed, "J. P. Seibert, Chairman," and this was done after the board had finally adjourned. Section 1370 of the Code makes the council of a city the reviewing board therein. Section 1373 provides that an appeal may be taken from the action of the board "by a written notice to that effect to the chairman or presiding officer of the reviewing board." By section 658 of the Code the mayor of a city is made the presiding officer of the council. When acting as a board of review, the council is performing a duty enjoined by law, and the mayor is as much the presiding officer then as at any other time. True, the statute provides for a temporary chairman or presiding officer in the absence of the mayor, but it also wisely provides that when one is appointed it shall be made a matter of record. There was no selection of Mr. Seibert to act, in the absence of the mayor, at the sessions of the board of review, nor was his selection as temporary presidng officer at any time ever entered of record. Nor do we think the statute contemplates the service of a notice of an appeal on the person who may happen to be acting as temporary chairman of the board when the particular matter in dispute is disposed of. If this construction were to be given the law, it would result in great confusion and uncertainty. We think the mayor of the city should have been served with notice in this case, and the judgment is affirmed. Affirmed.

Abstracts

Bell County Coke & Improvement Co. *v.* City of Pineville et al.

(Court of Appeals of Kentucky, Oct. 4, 1901.)

[64 S. W. Rep. 525.]

Municipal Taxation of Farming Lands.—The fact that land embraced within the boundary of a city is used for farming purposes, and derives no benefit from the city government, does not exempt it from taxation by the city.

Same—Former Judgment—Res Judicata.—A judgment perpetually enjoining a city from collecting a tax for a particular year is not a bar to the collection of a similar tax by the city upon the same property for another year.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by Bell County Coke & Improvement Company against the city of Pineville and its tax collector to enjoin the collection of taxes. Judgment for defendants, and plaintiff appeals. Affirmed.

Tinsley & Faulkner, for appellant.

C. W. Metcalf and J. L. Reeder, for appellees.

DU RELLE, J. Suit was brought by appellant against appellee city and its tax collector to enjoin the collection of taxes for the years 1895 to 1898, inclusive, upon appellant's property within the city limits of Pineville. The averments of the petition show that Pineville is situate on both sides of the Cumberland river where it passes through Pine Mountain; that the greatest length of that part of the city which is built up as a city does not exceed a mile, and its greatest width does not exceed a quarter of a mile; that the boundary defined by its act of incorporation is a circle of a mile and a half radius from the court house in the city; that by an amendment the boundary was extended by the addition of territory included in a line beginning at a point in the northwest line of the city limits 300 yards north of the center line of the Louisville & Nashville Railroad Company's right of way; thence west, and parallel with said line, to the west line of the land of appellant; thence with that line to the Cumberland river; and thence east with the river to the west line of Pineville. It is averred that appellant's lands are farm lands; that between its land and the city proper there is a large extent of farm lands, over half a mile in extent; that there is no connection by streets or otherwise between the city proper and its land; that its land cannot be used as city property, nor can the city exercise any police protection or control over its land, and therefore its land is not subject to city taxation, and the collection of the taxes claimed by the city would be a taking of property without due process of law. It is further insisted that the boundary defined by the original act and also that fixed by the amendment are void for uncertainty. In a second paragraph appellant pleads res judicata, alleging a judgment of the Bell circuit court perpetually enjoining the

city from collecting a similar tax upon appellant's property for the year 1891. The petition contains some other averments tending to show personal animosity against appellant by a member of the council, in refusing to vote for an ordinance excluding its property from the city limits. These averments we do not regard as in any way material to the case. The court, upon final hearing, sustained a demurrer to the petition, and, appellant declining to plead further, its petition was dismissed.

The objection that the city boundary is uncertain does not seem to us to be well taken. The case of Board v. Scott (Ky.) 42 S. W. 104, and the authorities there cited, seem to us to settle conclusively the question raised as to the power of the courts to correct such injustice as is here complained of, in the action of the legislature in fixing the territorial limits of the tax district. The case of City of Newport v. Com. (Ky.) 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, is decisive of the question raised by the plea of res judicata. For the reasons given, the judgment is affirmed.

Montgomery *v.* City of Lebanon.

(*Court of Appeals of Kentucky, Oct. 2, 1901.*)

[64 S. W. Rep. 509.]

Municipal Taxation—Abandonment of Country Domicile.—Where a farmer removed his family to a neighboring town in order to have the advantage of the schools there while his children were within the school age, but never voted in town, and spent the greater part of his time on the farm, and left a part of his household goods in his dwelling house on the farm, reserving the right to remove his family back to the house at any time, he has not, though he has remained in town for two years, abandoned his domicile in the country, and his personal property, consisting of cash, cash notes, etc., is not subject to municipal taxation.

Appeal from circuit court, Marion county.

"To be officially reported."

Action by E. A. Montgomery against the city of Lebanon for an injunction. Judgment for defendant, and plaintiff appeals. Reversed.

H. W. Rives, for appellant.

H. P. Cooper, for appellee.

GUFFY, J. In the case at bar it is clear that appellant never became domiciled in Lebanon unless he became so by reason of the facts occurring within two years preceding this litigation. His domicile was certainly in the county, not far from Lebanon, but outside of it. His only business is farming. He cultivates his farm, or has it cultivated. Part of his household goods remains in his house on his farm. He retains the right to remove his family back to his house at any time, and he says he spends most of his time on the farm, and that he removed his family to Lebanon to stay only while his two children were in the school age, the youngest of

whom was 16 years old at the time of the trial. He says he never exercised any of the privileges of citizenship peculiar to the city, never registered there as a voter. It is true that he sends his children free to the free school in Lebanon, but it does not appear that there is any special municipal tax collected for the support of the free school, and it is claimed for appellant that, inasmuch as he pays his share of the state tax devoted to free schools, he should be allowed to send his children to the free school in whatever district they might for the time being reside. After careful consideration of the law and facts of the case, we have reached the conclusion that the appellant had not, at the time of the trial of this case, lost or abandoned his country domicile. It results, therefore, that the court erred in dismissing his petition. We do not mean, however, to determine or decide that an indefinite continuation of his residence in Lebanon, or other acts, may not work a forfeiture of his country domicile, and authorize the court to hold that his true domicile is in Lebanon. The judgment appealed from is reversed, and cause remanded, with directions to perpetuate the injunction against the collection of the taxes then assessed, and for proceedings consistent herewith.

State ex rel. Wahoo Waterworks *v.* City of Wahoo et al.

(*Supreme Court of Nebraska, June 5, 1901.*)

[86 N. W. Rep. 923.]

Mandamus to Compel Tax Levy for Water Supply—Refused.—City authorities not required by mandamus to levy tax for water supply in excess of limit on such tax existing at time of contract.

(Syllabus by the Court.)

Error to district court, Saunders county; Hollenbeck, Judge.

Action by the state, on the relation of the Wahoo Waterworks, against the city of Wahoo and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Ira D. Marston and Frank Irvine, for plaintiff in error.

H. Gilkeson, G. W. Simpson, and E. E. Good, for defendants in error.

HASTINGS, C. It remains to mention the contention of relator that the council was empowered to contract for waterworks, and was by subdivision 2 of section 69 of the act of 1879, in all its forms and amendments, authorized to levy "any other tax or special assessment authorized by law," and therefore could and should make a special provision to meet this contract. We are not able to uphold this contention. Both the act of March 10, 1885, and that of March 31, 1887, expressly limit the tax that may be levied to pay on contract for water. This contract purports expressly to be one for the supply of water. That it is in the form of the rental of hydrants makes it none the less what it says it is,—an

agreement to supply water. We apprehend that relator would expect scant attention if its claim was only that it furnished dry hydrants. For the reasons above given, we think the judgment of the trial court should be affirmed.

DAY and KIRKPATRICK, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Madison County *v.* Frazier.

(*Supreme Court of Mississippi, March 11, 1901.*)

[29 So. Rep. 765.]

Taxation—Assessment by County Board—Premature Appeal.—Under Code 1892, § 80, providing that an appeal lies to the circuit court from the decision of the assessment board if taken within five days after adjournment of the meeting at which the assessment was made, an appeal from an assessment levied in August, taken within five days after the meeting adjourned, was premature, where such assessment was not confirmed until September, at an adjourned meeting of the board, since no decision was made until the confirmation of the whole assessment.

Appeal from circuit court, Madison county; Robert Powell, Judge.

Proceeding by J. P. Frazier against Madison county to review a tax assessment. From a decree in favor of the complainant, defendant appeals. Reversed and dismissed.

Chrisman & Howell, for appellant.

W. H. Powell, for appellee.

TERRAL, J. The board of supervisors of Madison county, at its adjourned meeting, on the 26th day of August, 1900, assessed J. P. Frazier for $17,464 as solvent credits, or directed him to be so assessed, and, not having finished a consideration of said assessment rolls, it adjourned on that day until its regular meeting, in September, 1900. At its September meeting it approved the assessment rolls of the county. However, on the 28th day of August, 1900, Frazier applied to the clerk of the board of supervisors, and obtained an appeal to the circuit court from the assessment of $17,464 of solvent credits made against him on August 26, 1900. The appeal was premature. The assessment was not approved until the 7th day of September, 1900, and until that day the matter was in fieri. No judgment had been made, and, no judgment having been made, there was nothing from which an appeal lay. The assessment of Frazier for $17,464 of solvent credits, made on the 26th day of August, 1900, was not approved by operation of law by reason of the adjournment of the board on that day until its September meeting. The assessment against Frazier was ineffectual until action was taken by the board after notice of the assessment being given to Frazier or his appearance thereto. The appeal of Frazier was premature, and it should have been dismissed from the

circuit court. Under section 80, Code 1892, an appeal lies to the circuit court from the decision of the board on the assessment of taxes, but here no decision had been made, nor was any attempted to be made, until the 7th day of September, 1900. Reversed and dismissed, at the costs of appellee.

State ex rel. State of Minnesota et al. *v.* District Court of Fourth Judicial Dist. et al.

(*Supreme Court of Minnesota, May 10, 1901.*)

[86 N. W. Rep. 15.]

Taxation—Purchase of Land for Park Purposes—Exemption of Contiguous Tract from Taxation—Statutes.—Chapter 30, Sp. Laws 1889, as amended by chapter 103, same laws, confers authority upon the board of park commissioners of the city of Minneapolis to contract for the conveyance of land to the city for park purposes in consideration of the exemption of other contiguous lands of the owner from assessments for park purposes, to the amount agreed upon.

Same—Same—Same—Construction of Statutes.—Such exemptions are not limited by the act to a single assessment made with reference to the property so purchased, but include all assessments, present or future, and also installments not yet entered for collection, but which have been assessed prior to the execution of the contract.

Same—Same—Same—Construction of Contract in Deed.—A certain deed examined, which contained a contract to the effect that the consideration of certain lands conveyed to the city was $100,000, to be paid by the exemption of certain other contiguous lands of the grantors to the entire amount of $100,000: *held*, that the contract embraced an assessment which had already been made against such remaining contiguous property, but which had not been entered upon the tax books for collection.

(Syllabus by the Court.)

Application by the state, on the relation of the state of Minnesota and the city of Minneapolis, for a writ of certiorari to the district court of the Fourth judicial district of county of Hennepin and others, to review a judgment. Judgment affirmed.

F. H. Boardman, Co. Atty., and C. J. Rockwood, for relators.

A. H. Young and M. B. Koon, for respondents.

McEntire *v.* Williamson, Sheriff, et al.

(*Supreme Court of Kansas, June 8, 1901.*)

[65 Pac. Rep. 244.]

Taxation—Injunction—Judgment—Res Judicata.—A valid judgment against a city on coupons clipped from municipal bonds of such city, regularly issued, and the issuance of a peremptory writ of mandamus in a proceeding regularly brought for such purpose against the officers of such city and their successors in office, commanding such officers to levy a tax to pay such judgment, is conclusive upon the question whether the levy ordered is in excess of the statutory power of the city to levy taxes, and cannot be again raised or retried in a subsequent action for injunction brought by a taxpayer in such city.

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Same—Same—Same—Same—Privity of Parties.—A taxpayer in a city is in privity with the municipal officers of such city in a proceeding brought against them in their representative capacity for the purpose of obtaining a writ of mandamus to compel the levy of a tax to pay a valid judgment against the city, and is concluded by the final decision and the issuance of a peremptory writ of mandamus upon all questions necessarily involved in the final decision and the granting of such peremptory writ as effectively as are the parties to the record.

(Syllabus by the Court.)

Error from district court, Pratt county; G. W. McKay, Judge.

Suit by J. H. McEntire, receiver of the Wichita & Western Railway Company, against H. R. Williamson and others. Decree for defendants, and plaintiff brings error. Affirmed.

A. A. Hurd and O. J. Wood, for plaintiff in error.

B. D. Crawford, for defendants in error.

Martin *v.* Kearney County et al.

(*Supreme Court of Nebraska, Sept. 18, 1901.*)

[87 N. W. Rep. 351.]

Appeal—Waiver of Errors Not Argued.—Alleged errors not argued in brief of counsel for plaintiff in error may be deemed to have been waived.

Taxation—Property Sold for Taxes Illegally Imposed—Proceeds Not to Be Refunded.—Cities of the second class of less than 5,000 population, empowered by law to levy taxes for municipal purposes, cannot be required to refund money received for illegal taxes imposed by such city from a purchaser of real estate at a sale made thereof by the county treasurer for delinquent taxes, in the absence of statutory authority providing for the refunding of such taxes. McCague *v.* City of Omaha, 78 N. W. 463, 58 Neb. 37, followed.

Delinquent Tax Sale—Purchaser a Volunteer.—The purchaser of real estate at delinquent tax sale is a volunteer, and subject, ordinarily, to the rules applicable to voluntary payment of taxes.

Same—Same—Caveat Emptor.—The rule of caveat emptor applies to the purchaser of real-estate tax sales. McCague *v.* City of Omaha, supra.

Same—Same—Same—Public Records—Notice.—A purchaser of real estate at delinquent tax sale is charged with notice of the public records showing the manner in which taxes for municipal purposes charged against the real estate purchased were levied by the city authorities empowered by law to levy such taxes.

Same—Irregular Levy—Wrongful Act of Officers—County Not Liable to Refund Proceeds—Statute.—Irregular action by a city council in making a levy of taxes for municipal purposes, resulting in the levy being declared illegal and void, is not "a mistake or wrongful act of the county treasurer or other officer," within the meaning of section 131, art. 1, c. 77, Comp. St., for which the county can be held liable to refund to a purchaser at delinquent tax sale the illegal taxes so attempted to be levied.

Recovery of Money Paid for Illegal Taxes—Compliance with Statute.—A party, to recover, under the provisions of a statute, illegal taxes paid, must bring himself within its terms.

(Syllabus by the Court.)

Error to district court, Kearney county; Beall, Judge.

Action by James A. Martin against Kearney county and the

city of Minden. Judgment for defendants, and plaintiff brings error. Affirmed.

J. L. McPheeley and J. B. Scott, for plaintiff in error.
E. C. Dailey and L. W. Hague, for defendants in error.

Mayor, etc., of City of Baltimore et al. *v.* Bonaparte.
(*Court of Appeals of Maryland, March 8, 1901.*)
[48 Atl. Rep. 735.]

Taxation—Revaluation by Court of Appeals Not a Judicial Function—Constitutional Law.—Baltimore City Charter, § 170, provides that the determination of the Baltimore city court reviewing a decision of the appeal tax court as to a revaluation of property may be appealed to the court of appeals, and that the latter court shall hear and determine the questions involved in the appeal: *held*, that where the city appeals from a decision of the city court, the only question involved being the propriety of the amount of valuation, such question cannot be reviewed, since the court of appeals cannot review a question of fact, and the legislature cannot impose on such court the duty of making valuations for taxation, the same not being a judicial duty.

Appeal from Baltimore city court; Henry Stockbridge, Judge.

"To be officially reported."

Appeal by Charles J. Bonaparte from the action of the appeal tax court revaluing certain property. From a reduction of the assessment the mayor and city council of Baltimore and others appeal. Dismissed.

Argued before McSHERRY, C. J., and PAGE, PEARCE, FOWLER, and SCHMUCKER, JJ.

Wm. Pinkney Whyte and Charles W. Field, for appellants.
Charles J. Bonaparte, pro se.

McSHERRY, C. J. The function of assessing property for purposes of taxation is essentially not a judicial function, and it cannot be made a judicial function by being imposed upon or committed to the judicial department. In the case of Robey v. Commissioners (recently decided by this court) 48 Atl. 48, we had occasion to say, in speaking of an act of assembly which required the judges of certain circuit courts to approve the accounts of constables, sheriffs, and other officers against the county, that the duty thus attempted to be imposed was not judicial, and did not become judicial by being assigned to a judge. The thing to be done does not derive its character from the individual who does it. If it be not, by reason of its attributes, judicial, it does not become judicial by being performed by a judicial officer. Hence it is that the nature of the act must be sought in its attributes and qualities apart from the official title of the actor. The ordinary, usual valuation of property for purposes of taxation is in no sense a judicial act, though requiring the exercise of judgment in its performance. As this court can only be required to discharge judicial duties, it cannot, on an appeal involving solely the question of the

accuracy of an assessment, be directed by the general assembly to sit in judgment on such a valuation, because such a valuation is not the result of the exercise of any judicial function, and it must be assumed that the legislature knew this, and, knowing this, that it did not intend, by the language it used, to include such a duty in the appeal which section 170 of the charter authorizes. There doubtless may be cases in the forum of equity where relief would be granted against an unlawful assessment, but we are not considering such a situation; we are dealing only with the power of the legislature to convert this court on appeals under section 170 into a final board of review and revaluation to reassess property for purposes of taxation. We hold that the general assembly could not lawfully require this court to exercise this nonjudicial function, and that, therefore, it did not intend to impose it. For the reasons we have assigned, the appeal must be dismissed. Appeal dismissed, with costs.

Swords, Sheriff and Tax Collector, *v.* Baillio (Parish of St. Landry, Intervener).

(*Supreme Court of Louisiana, May 20, 1901.*)

[29 So. Rep. 942.]

Constitutional Law—Parish License—Exemption of Municipalities.—There is no conflict between article 48 and the concluding paragraph of article 229 of the constitution of 1898. The latter merely gives the general assembly authority to exempt municipalities from the payment of parish licenses when the licenses levied by such municipalities are equal in amount to those levied by police juries for parochial purposes; but in the case of towns of less than 2,500 inhabitants this must be done by a general law applicable alike to all municipalities of that class, and not by a special law applicable alone to one municipality.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Landry; Edward T. Lewis, Judge.

Action by M. L. Swords, sheriff and tax collector, against G. R. Baillio. The parish of St. Landry intervenes. Judgment for plaintiff, and defendant appeals. Amended.

Kenneth Baillio, for appellant.

William J. Sandoz, for appellee Swords.

R. Lee Garland, Dist. Atty. (E. B. Du Buisson, of counsel), for appellee parish of St. Landry, intervener.

New York Life Ins. Co. *v.* Board of Com'rs of Cuyahoga County, Ohio.

(*Circuit Court of Appeals, Sixth Circuit, January 8, 1901.*)

[106 Fed. Rep. 123.]

Statutes—Retroactive Effect—Requiring County to Fulfill Moral Obligation.—Under authority given by an act of the legislature of Ohio, a county issued and sold bonds at par and accrued interest for the purpose of purchasing a site and building an armory for the use of the state national guard. After it had purchased the site and prac-

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tically completed the building, expending for the purpose nearly all the proceeds of the bonds, and after it had paid two installments of interest thereon, the supreme court of the state decided, in a suit by a taxpayer, that the act authorizing the issuance of the bonds was in violation of the constitution, as authorizing the imposition of a local tax for a general state purpose, and that the bonds were void. In 1898 the legislature passed an act (Rev. St. Ohio, § 2834c) which in effect required any county having issued and sold bonds under the circumstances of this particular case to recognize and fulfill the equitable and moral obligation created thereby to reimburse the holders of such bonds to the amount of the principal and interest thereof, and, in case of its refusal to do so, gave the holders of the equitable claim a right of action thereon, further providing that the county might devote the building to any county purpose: *held*, that such act was not retroactive in a constitutional sense, as applied to the county in question, nor in violation of the provision against local taxation for general state purposes, but was valid; it being within the province of the legislature to determine, as between the state and county, upon which the moral obligation rested to discharge the debt and take the property, and the facts upon which it acted being undisputed.

In Error to the circuit court of the United States for the Northern District of Ohio.

Henry A. Garfield, for plaintiff in error.

P. H. Kaiser, for defendant in error.

Before HARLAN, Circuit Justice, SEVERENS, Circuit Judge, and THOMPSON, District Judge.

SEVERENS, C. J. Recurring to the circumstances of the present case, the county received the full par value of the bonds, purchased the site, and erected the building, continuing to recognize its obligation upon the bonds by paying interest, and now holds the title to, and is in possession of, the property acquired by the borrowed money. No taxpayer of the county appears to have raised any objection until after the transaction had been substantially accomplished. There was no other fault that could be attributed to either party than that of having made a mistake in respect to the legal authority of the county. The circuit judge was impressed by the equities of the case, and indicated his sense of justice in the state's assumption of the obligation. Doubtless this might have been done. But the legislature, in doing this, would have been in the exercise of a power which included the power to determine whether, upon its view of the fitness and justice of the case, the burden should be cast upon the state or upon the county. It might think that as the county, not acting under compulsion, had, upon consideration of the local advantages which would accrue to it from having an armory for the National Guard in its midst, determined to build one and pledge its own faith for the necessary funds, and had taken no step to recant until after it had spent the lender's money, it would not be inequitable that it should take the burden as its own obligation. In point of fact, however the matter might stand in theory, the substantial benefits of the building of an armory in that locality were enjoyed most largely by the local public, and in a much less degree by the people of the state at large. This may be

regarded as a broad view of the matter, but it is upon such views that the legislative discretion is exercised. The claim having been established as a moral obligation of the county, it was erroneous to hold that the act which required the county to pay it was in violation of the provision of the constitution which ordains that taxes for general purposes must be levied upon all the taxable property of the state.

It remains to notice some incidental suggestions bearing upon the principal questions advanced by counsel for the defendant in error. Our attention is called to section 28 of article 11, whereby certain curative powers are conferred upon the legislature, relating to "omissions, defects and errors in instruments and proceedings." But, as it is not claimed that the legislature exercised its power under that grant, the suggestion becomes irrelevant and need not be pursued.

In connection with the subject of the disposition of the money borrowed and the acquisition of the armory, it is urged that the county did not have the legal capacity to take and hold property acquired for such a purpose. But the act in question, if otherwise valid, recognizes the acquisition of the property by the county as vesting the ownership in it, and further authorizes the appropriation of it to any county purpose. Such provisions would validate the acquisition of the property. 2 Dill. Mun. Corp. 560. Besides, on the general principle, if the taking of the title was not for an authorized purpose, the state alone is competent to make objection. Id. 574.

It is also contended that the statute is obnoxious to section 10 of article 1 of the constitution of the United States, which prohibits legislation impairing the obligation of contracts. But this assumes a contract which is legally valid, and the county denies the existence of any such contract. The legislature concedes this, and imposes the duty upon other grounds, which it is empowered to take notice of for the purpose of determining whether, independently of the existence of a contract, a moral obligation rests upon the county. Moreover, the county being a mere governmental agency of the state, its contracts for public purposes, so long as they remain unperformed, are, as between the county and the state, subject to the control of the legislature. The county has no vested right in such case which it can oppose to the paramount authority. Maryland v. Baltimore & O. R. Co., 3 How. 534, 11 L. Ed. 714; Board v. Lucas, 93 U. S. 108, 23 L. Ed. 822; Board v. Skinkle, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446.

For the reasons stated, we are of opinion that the circuit court erred in sustaining the demurrer. The judgment is accordingly reversed, and the cause remanded, with directions to overrule the demurrer and take such further proceedings in the case as it may be advised, not inconsistent with this opinion.

City of Rochester *v.* West.

(Court of Appeals of New York, Nov. 20, 1901.)

[58 N. E. Rep. 673.]

Police Power—Billboards—Power of City Council to Regulate Height.—Under Rochester city charter (Laws 1880, c. 14, § 40, subd. 21, as amended by Laws 1894, c. 28, § 9), authorizing the city to license and regulate bill posters and sign advertising, and to prescribe the terms and conditions on which any such license should be granted, an ordinance prohibiting the erection of billboards exceeding six feet in height without permission of the council is not an unreasonable and undue restraint of a lawful business, or of the lawful use of private property; being intended to provide for the safety of the community.

Appeal from supreme court, appellate division, Fourth department.

Robert West was convicted in the police court of Rochester of violating a city ordinance regulating bill posting, and appealed. On affirmance by the county court (51 N. Y. Supp. 482), accused appealed to the appellate division, which affirmed the judgment. 53 N. Y. Supp. 1101. Appeal on certified questions from the appellate division. Affirmed.

John R. Fanning, for appellant.

P. M. French, for respondent.

MARTIN, J. We are of the opinion that this ordinance is reasonable; that the legislature authorized its adoption; that the statute in pursuance of which it was passed was valid; and, consequently, that the defendant's appeal cannot be sustained.

It follows that the judgment appealed from should be affirmed. The questions certified to this court are answered as follows: (1) The common council of the city of Rochester had authority, under its charter, to pass the ordinance under consideration. (2) The ordinance in question is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property.

O'BRIEN, BARTLETT, HAIGHT, VANN, and LANDON, JJ., concur; PARKER, C. J., not sitting.

Judgment affirmed, with costs.

Springfield Water Co. *v.* Burgess, etc., of Borough of Darby.

(Supreme Court of Pennsylvania, May 27, 1901.)

[49 Atl. Rep. 275.]

Ordinance Regulating Connections with Water Pipes—Reasonableness.—An ordinance regulating the making of openings, laying pipes, etc., in streets is a reasonable exercise of the police power, and therefore binding on a water company, it requiring a permit prior to the making of an opening, the paying of a fee of $3 by an applicant for a permit, and the giving by him of an obligation, with sureties, conditioned that the excavation shall be properly filled, and providing that the length of the excavation for which a permit may be granted shall not exceed 300 feet, and shall remain in force not exceeding 10 days.

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Appeal from court of common pleas, Delaware county.

Suit by the Springfield Water Company to enjoin the burgess and town council of the borough of Darby. Bill dismissed, and plaintiff appeals. Affirmed.

E. H. Hall, for appellant.

John B. Hannum and Edward P. Bliss, for appellee.

MITCHELL, J. Two questions were raised in the court below: First, whether plaintiff had legally acquired the rights of the Citizens' Water Company to lay water pipes in the borough of Darby. This was decided by the court in favor of the appellant. It therefore does not arise on this appeal, and we express no opinion upon it. The second question was whether the ordinance regulating the making of openings, laying pipes, etc, in the streets of the borough, was a reasonable exercise of the police power, and therefore binding on the plaintiff. We affirm the judgment upon the opinion of the court below on this point. Judgment affirmed.

Northwestern Tel. Exch. Co. *v.* City of Minneapolis et al.*

(*Supreme Court of Minnesota, May 10, 1901.*)

[86 N. W. Rep. 69.]

Poles and Wires in Streets—Statutes.—*Held*, that under the general laws of this state (section 28, c. 34, Gen. St. 1866), as amended by chapter 73, Gen. Laws 1881 (section 2641, Gen. St. 1894), telephone companies are given the right to erect poles and wires within the urban ways and streets of this state as well as upon rural highways.

Same—Reasonable Control by City—Charter Provision—Subsurface Conduits.—That the provisions of the charter of Minneapolis confer upon that city no authority to arbitrarily order a removal of such poles and wires, but only the right to regulate the placing of the same in its streets, and to compel the telephone companies to put their wires in subsurface conduits when reason, convenience, or the good government of the municipality requires.

Start, C. J., dissenting.

(Syllabus by the Court.)

On rehearing. Reversed.

For former opinion, see 83 N. W. 527.

D. F. Morgan, A. H. Noyes, and G. D. Emery, for appellant.

Frank Healy (W. A. Lancaster, of counsel), for respondents.

Ex Parte McClain.

(*Supreme Court of California, Sept. 6, 1901.*)

[66 Pac. Rep. 69.]

Police Powers—Lottery Tickets -Validity of Ordinance.—San Francisco city and county ordinance No. 68, making it unlawful for any person to have in his possession any lottery ticket, being authorized by Const. art. 11, § 11, empowering cities and counties to make and

*For former opinion, see 4 Mun. Corp. Cas. 459.

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enforce within their limits such local, police, and sanitary regulations as are not in conflict with general laws, is not void as being an unreasonable and oppressive police regulation.

In bank. Application by William McClain for a writ of habeas corpus. Writ discharged, and prisoner remanded.

N. S. Wirt, for petitioner.

A. S. Newburgh, amicus curiæ.

Chas. L. Weller, Asst. Dist. Atty., for respondent.

HENSHAW, J. By ordinance No. 68 of the city and county of San Francisco, it is made "unlawful for any person to have in his possession any lottery ticket," etc., and upon conviction of a violation of the terms of the ordinance, the defendant may be punished by fine, imprisonment, or both. The petitioner here was convicted of a violation of this ordinance, and seeks his release under this writ, upon the asserted ground that the ordinance in question is unreasonable and void. The United States government refuses the use of its mails to advertising lotteries, transmission of lottery tickets, the announcement of the winning numbers in lotteries,—in short, to the sending of any literature in aid of such gambling schemes; and it makes penal the violation of its laws in any of these respects. The state of California by its penal laws prohibits the setting up of a lottery, and declares it to be a misdemeanor for any person to sell a lottery ticket. There are, then, against all gambling devices of this kind, not only the public policy of the general government and of this state, but also the express mandate of their criminal laws, so that the avowed policy and the expressed intent is to stamp out by penal legislation the traffic in lottery tickets. It is true that the state, while declaring it to be a penal offense to sell a lottery ticket, has not made the purchaser equally culpable. But no one will question the right of the state to declare, if it see fit so to do, that the purchaser of a lottery ticket, equally with the seller, is guilty of a misdemeanor. It may be concluded, therefore, that in a reasonable exercise of its police powers a municipality may pass any ordinace in furtherance of the avowed general policy of the national and state government. In this regard our cities and counties draw their power, not from legislative permission, but from the direct grant of the constitution itself, which by article 11, § 11, empowers them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

The matter of this ordinance being, then, clearly one of police regulation, and the power to pass such ordinances being expressly conferred upon a municipality, there is left for consideration the question whether the exercise of that power in this instance be unreasonable or oppressive for the accomplishment of the end in view. Against its validity it is urged that it is unreasonable in making the mere possession, without reference to any ultimate intent of the possessor, an

offense; and, as is usual when a law is attacked upon this ground, harrowing instances are cited, as of a blind man to whom might be given a lottery ticket, he not knowing it to be such, or of another into whose pocket might be thrust the damnatory paper, without knowledge upon his part that it was in his possession, and even—so run the argument and citations—the peace officer who arrests a violator of the law, and takes into his own custody the criminatory evidence, is, under the terms of this ordinance, equally guilty. But the answer to all this is the answer that has been made by every court as often as the argument has been pressed to consideration. The matter is discussed in Ex parte Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, wherein is quoted the language of Mr. Justice Field in U. S. v. Kirby, 7 Wall. 482, 19 L. Ed. 278, which may well be repeated here: "General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." This kind of legislation is not new to jurisprudence, nor novel upon the statute books of this state; yet it has never been found necessary to overthrow a law otherwise valid because in some suppositious case a person might be charged with its violation who came within the letter, yet not within the spirit, of the enactment. An ordinance of this city and county, for example, prohibits the carrying of a concealed weapon. It is the mere carrying, under the letter of the law, which constitutes the offense, not a carrying with intent to commit some act of violence. Yet this court has found no difficulty in upholding the law. Ex parte Cheney, 90 Cal. 617, 27 Pac. 436. The citizen who bought a pistol or knife at a gun store, caused it to be wrapped in a parcel, and proceeded to carry it to his home, might be said, under the letter of the law, to have committed a violation of it. Yet he has not violated the spirit of the law, and the law would hold him guiltless. The statute books of this and other states abound in provisions for the protection of fish and game, and among them is commonly found a law making it penal for one within certain designated months "to have in his possession" fish or game of prescribed kinds. In such laws it is not the purpose of the possession, but the fact of possession, which prima facie establishes the offense. And so, while in their construction of the game laws courts have differed as to their scope,—some holding that the defendant was exculpated if he showed that the game in his possession was killed without the boundaries of the state, others holding that it applied equally to game so destroyed,—in all cases there has been an agreement by the courts that the fact of possession prima facie evidenced a violation of the act. Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; State v. McGuire, 24 Or. 370, 33 Pac.

666, 21 L. R. A. 478; Com. v. Wilkinson, 138 Pa. 304, 21 Atl. 14; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Judy, 7 Mo. App. 524; Bellows v. Elmendorf, 7 Lans. 462; People v. Fishbough, 134 N. Y. 393, 31 N. E. 983. The design of the ordinance is to stamp out lotteries and the traffic in lottery tickets. For, if there were no buyers of lottery tickets, there would be no sellers of them; and while, as has been said above, by the state law only the seller is made culpable, it is clearly within the power and province of the municipality, in its endeavor to eradicate the evil, to hold the purchaser or possessor also culpable.

In the case of Wong Hane the attention of the court was directed more particularly to the requirements of the ordinance which seemed to exact from the defendant proof of his innocence. If a variance shall be thought to exist between the views there expressed and those here announced, it need but be said that we are satisfied that the present views enunciate a sound principle of statutory construction.

For the reasons above given, the writ is discharged, and the prisoner remanded.

We concur: BEATTY, C. J.; McFARLAND, J.

GAROUTTE, J. I concur in the judgment, but deem the language of Justice Fields, cited in the main opinion, entirely too general to serve as authority in support of the conclusion here declared. Neither am I at all disposed to agree to the reasoning contained in the opinion of the court promulgated in Ex parte Lorenzen. At the same time I see no reason why the law-making power may not declare that the possession of a lottery ticket by a person shall constitute a misdemeanor. The statute clearly means a possession knowingly, and, so construed, there is no legal objection to its validity. Ford v. State, 85 Md. 465, 37 Atl. 172, 41 L. R. A. 551, 60 Am. St. Rep. 337; Ex parte Mon Luck, 29 Or. 421, 44 Pac. 693, 32 L. R. A. 738, 54 Am. St. Rep. 804.

City of Kansas City *v.* Baird.

(*Supreme Court of Missouri, Division No. 2, May 21, 1901.*)

[63 S. W. Rep. 495.]

Police Power—Ordinance Requiring Physicians to Report Certain Diseases to Board of Health—Legality of Conviction under.—A conviction of a Christian Scientist, who performs alleged services for the sick, and receives compensation therefor, for a violation of a city ordinance requiring physicians to report all cases of diphtheria to the board of health, is not a violation of Const. art. 2, § 5, guarantying religious freedom, and hence an appeal will not lie to the supreme court on the ground that the cause presents a constitutional question.

Appeal from criminal court, Jackson county; John W. Wofford, Judge.

Mrs. A. J. Baird was convicted for a violation of a city ordinance requiring physicians to report all cases of diphtheria to

the state board of health, and she appeals. Appeal dismissed for want of jurisdiction, and cause transferred to the Kansas City court of appeals.

The defendant was a Christian Scientist, who was accustomed to receive compensation for tending the sick, and she was called to see a patient alleged to have diphtheria, but failed to report the case to the board of health, either before or after the death of the child.

Witten & Hughes and McDougal & Sebree, for appellant.
Frank Gordon, for respondent.

GANTT, J. This is an action for the violation of a city ordinance of Kansas City, which provides that "every physician who shall prescribe for or treat any case of * * * diphtheria * * * shall immediately on receiving knowledge that the person or persons are afflicted with any of said diseases report the same to the board of health; and any physician who shall fail, neglect, or refuse to so report," etc., "shall be deemed guilty of a misdemeanor, and on conviction fined not more than fifty dollars." The petition charges that Mrs. Baird did "unlawfully fail, neglect, and refuse to report to the board of health of said city a certain case of diphtheria of which she had knowledge, which said case of diphtheria the said Amanda J. Baird, physician, attended and treated in professional capacity, and had knowledge that said patient was afflicted with diphtheria." The defendant pleaded not guilty, was tried, and fined $50.

This case has been improperly appealed to this court. There is no constitutional question involved in this case. It is true, in her motion for new trial defendant says the judgment is in violation of section 5, art. 2, of the constitution of this state, but she might as well have named any other provision of the organic law, as it is evident that her constitutional right of religious freedom was in no sense involved in the action. The record is ordered transferred to the Kansas City court of appeals, because this court has no jurisdiction to hear and determine this appeal.

SHERWOOD, P. J., and BURGESS, J., concur.

Board of Council of Harrodsburg *v.* Renfro.

(*Court of Appeals of Kentucky, Oct. 30, 1900.*)

[58 S. W. Rep. 795.]

Intoxicating Liquors—License Fee—Unwarranted Discrimination.—A city ordinance fixing a certain fee for license to sell liquor on any street other than Main street, and fixing a larger fee for license to sell on that street, is invalid, to the extent that it discriminates against business conducted on Main street, being to that extent special legislation.

Same—Same—Recovery of Excess Illegally Exacted.—Money paid to a city as a license fee may be recovered, to the extent that it exceeded the amount which the city was entitled to exact.

Appeal from circuit court, Mercer county.

"Not to be officially reported."

Action by the board of council of Harrodsburg against R. C. Renfro to recover money paid. Judgment for defendant, and plaintiff appeals. Affirmed.

P. B. Thompson, for appellant.

Gaither & Vanarsdall, for appellee.

WHITE, J. We are clearly of the opinon that the ordinance fixed the license fee at $600 and no more. The provision or exception as to Main street was special and local legislation, and is invalid. The council could have made the license for the city at $900, but, if it had done so, it could not have then excepted business not conducted on Main street, and provided that such business not on Main street should pay only $600. This would have been equally objectionable. The charter of a municipal corporation is a delegation of powers to its governing authority by the legislative branch of the government, and no powers will be presumed to have been granted that are not mentioned or not necessarily included in a general grant of power. Certainly a power that the legislature itself cannot exercise will not be presumed to be granted to a municipal corporation. It appearing from the answer and counterclaim that appellee had paid $100 in excess of the license fee, he was entitled to recover same from the city. Bruner v. Town of Stanton (Ky.) 43 S. W. 411. There is no error. Judgment affirmed.

Rowland *v.* City of Greencastle.

(*Supreme Court of Indiana, Dec. 21, 1900.*)

[58 N. E. Rep. 1031.]

Liquor Traffic—Regulation—Residence Districts—Validity of Ordinance Defining.—Burns' Supp. Rev. St. 1897, § 3541, as amended by Laws 1895, p. 180, grants to the common councils of cities power to license, regulate, and restrain places for the sale of intoxicating liquors to be consumed on the premises, and, in so doing, to designate the room, building, or structure where such sale may be made, and to exclude such sales from the suburban or residence districts, and confine the same to the business portion, and to prescribe the interior and exterior arrangement and construction of the room where such sales were made, and what games should be played there: *held*, that Greencastle city ordinance, arbitrarily defining what should be the business portion of the city, bounding it, and declaring all the rest of the city to be residence or suburban portions, and forbidding the sale or keeping of intoxicating liquors for sale in such residence or suburban portions, was invalid, since the statute empowering the council to regulate the liquor traffic, being a delegation of special power to the city, would not be construed to include the right to arbitrarily declare a portion of the city a suburban or residence district, such right not being mentioned among the means of regulation specified in the statute, nor essential to the power to regulate in the manner specified.

Appeal from circuit court, Putnam county; S. M. McGregor, Judge.

Action by the city of Greencastle against Daniel B. Row-

land to recover a penalty for a violation of a city ordinance prohibiting all saloons, except in a specified district. From a judgment of the circuit court, affirming a judgment of the mayor's court in favor of plaintiff, defendant appeals. Reversed.

Lewis & Corwin and Lamb & Beasley, for appellant.

Moore Bros. and J. T. McClary, for appellee.

HADLEY, C. J. The arbitrary declaration of a city council that a certain district is a residential or suburban portion of the city does not make it so, if in fact it does not possess that character. Bybee v. State, 94 Ind. 443, 447; City of Evansville v. Miller, 146 Ind. 613, 618, 45 N. E. 1045, 38 L. R. A. 161; Cole v. Kegler, 64 Iowa, 59, 19 N. W. 843; Yates v. City of Milwaukee, 10 Wall. 497, 505, 19 L. Ed. 984; Grossman v. City of Oakland, 30 Or. 478, 484, 41 Pac. 5, 36 L. R. A. 593; City of St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49; Everett v. City of Marquette, 53 Mich. 450, 19 N. W. 140; Darst v. People, 51 Ill. 286; Miller v. Burch, 32 Tex. 208. It may well be doubted if the power contended for by appellee would not be an unsafe power. Authority to fix by ordinance the permissive and prohibited districts of a city might well be expected in some cases to be capriciously carried to limits equivalent to prohibition,—a length to which the legislature has up to this time refused to go,—and would, as said in Yates v. City of Milwaukee, 10 Wall. 497, 19 L. Ed. 984, "place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities." The ordinance of February 8, 1898, referred to in the complaint, is without legislative authority, and is therefore void. Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

Griffin *v.* Messenger, County Treasurer, et al.

(Supreme Court of Iowa, May 18, 1901.)

[86 N. W. Rep. 219.]

Ordinances—Validity—City Council—Mayor to Vote Only in Case of Tie.—Under Code 1873, § 531, making the mayor of a city of the second class a member of the city council, he is to be regarded as a member for all purposes, though only voting in case of a tie; and hence, under section 489, requiring ordinances levying special assessments to be read on three successive days unless three-fourths of the council shall vote to dispense with the rule, a vote of five members of a council composed of six councilmen and the mayor is insufficient to suspend the rule, and an ordinance passed in pursuance of such action without being read on three successive days is invalid.

Appeal from district court, Clay county; F. H. Helsell, Judge.

Action in equity to restrain the sale of lots for taxes levied for the construction of a sewer. Trial and a decree for the plaintiff. The bank appeals. Affirmed.

Cornwall & Martin, for appellant.

J. E. Steele and Carr & Parker, for appellee.

SHERWIN, J. The lots upon which the special assessment was levied are in Spencer, a city of the second class. The ordinance providing for the construction of the sewer was adopted without reading the same on three different days, as required by section 489, Code 1873. At the time of its adoption five of the six councilmen and the mayor were present. Upon a motion to suspend the rule requiring its reading on three different days, and to pass the ordinance forthwith, the five councilmen present voted in the affirmative, and the rule was declared suspended and the ordinance was adopted. The law in force in 1892, at the time the ordinance in question was adopted, explicitly provided that the mayor of a city of the second class should constitute a member of the city council. Section 531, Code 1873. In Spencer, where there were six councilmen elected, the council consisted of seven members, because of this express statute making the mayor a member thereof. As only five members of the council voted for a suspension of the rule requiring the ordinance to be read on three different days, the appellee contends that the vote was insufficient to suspend the rule, and that the ordinance is therefore void, while, on the other hand, the appellant maintains that the mayor is not to be considered a member of the council when it comes to a vote of this kind.

The mayor was by law made a constituent part of the city council. How it is possible to eliminate him in determining the number of persons composing the council, we are unable to see. It is true, he had a vote only when there was a tie; but this restriction upon his power to vote rendered him none the less a component part of the council, under the law. The language of the statute is clear and unambiguous where it declares that such ordinances shall be read on "three different days unless three-fourths of the council shall dispense with the rule." It does not say three-fourths of the council, excluding the mayor, nor three-fourths of the council ordinarily voting, and to give it the construction contended for by the appellant would require judicial legislation. Horner v. Rowley, 51 Iowa, 620, 2 N. W. 436. See, also, Cochran v. McCleary, 22 Iowa, 75; State v. Yates (Mont.) 47 Pac. 1004, 37 L. R. A. 205; Dill. Mun. Corp. §§ 260, 261. The ordinance was void. Horner v. Rowley, supra. State v. Alexander, 107 Iowa, 177, 77 N. W. 841, does not consider the question before us, and is not authority for appellant's position. The only other question argued relates to the constitutionality of the assessment. It is not necessary to consider this, because what we have already said disposes of the case. Affirmed.

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City of Iowa City *v.* McInnerny.

(*Supreme Court of Iowa, Oct. 11, 1901.*)

[87 N. W. Rep. 498.]

Intoxicating Liquors—Ordinance Regulating Opening of Saloons on Election Day.—Under Code, § 2455, empowering cities and towns to adopt rules and ordinances for further regulating and controlling the liquor traffic for the preservation of peace and good order, and section 680, authorizing cities to pass ordinances for the public safety, to preserve the health, promote prosperity, and improve the morals, order, comfort, and convenience of the public, a city council may pass ordinances, not in conflict with the state law, regulating the closing of saloons on election day.

Same—Same—Conflict with General Law.—Code, § 2455, authorizes cities and towns to adopt rules and ordinances for further regulating and controlling the liquor traffic, not in conflict with the provisions of the chapter; and section 2448, subd. 9, in the same chapter, prohibits a saloon from opening on any election day. The penalties provided by statute for violation of the liquor law are prosecutions, either civil or criminal, for keeping a nuisance, or for unlawful sales, or the liquors may be confiscated: *held*, that a city ordinance which prohibited the opening of a saloon on election days, and prescribed a fine not exceeding $50 for its violation, was in conflict with the state laws, and invalid.

Appeal from district court, Johnson county; M. J. Wade, Judge.

Defendant was accused of keeping his saloon open on election day, contrary to the provisions of an ordinance of plaintiff city. On appeal to the district court he was convicted, and appeals to this court. Reversed.

Ranck & Bradley, for appellant.

W. H. Bailey, for appellee.

DEEMER, J. In the case at bar the ordinance did not further regulate and control the liquor traffic. It simply reiterated the conditions of the mulct law, and made violation of any of the provisions an offense punishable by fine, as before stated. This fine was very much less than that imposed by the statutes of the state, and the enforcement of the ordinance would, no doubt, have a tendency to impair the administration of criminal justice. The rule and ordinances referred to in the statute are additional to those imposed by statute, and an attempt at making breach of the condition of the mulct law an offense against the municipality is in conflict with the provisions of the chapter. We really have no occasion to go into the vexed question of the power of a city to punish acts already made criminal by the laws of the state. It is enough to say that municipalities, as a general rule, gain their power and authority from the legislature, and in passing their ordinances are, in effect, enacting special laws, which, to a great degree, supersede the general law within the territorial limits of the corporation. Surely, then, an ordinance covering a subject already fully covered by an act of the legislature is in conflict therewith. See Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731. We have already

referred to and attempted to distinguish the Bloomfield Case, and need say no more about it in this connection.

Our conclusion is that the ordinance is not for further regulating and controlling the liquor traffic, and that it is in conflict with the provisions of the chapter known as the "Mulct Law," and cannot be sustained. The judgment is therefore reversed.

State *v.* Rohart.

(Supreme Court of Minnesota, May 17, 1901.)

[86 N. W. Rep. 93.]

Parkways—Use by Heavy Teams—Ordinance Regulating Width of Tires—Unreasonableness.—An ordinance of the board of park commissioners of the city of Minneapolis provides that no vehicle which, together with its load, weighs more than 2,000 pounds, and which is in use for carrying goods, merchandise, building material, manure, dirt, earth, or other article or commodity, and which has tires less than six inches in width, shall pass or enter upon any park or parkway: *held*, as applicable to a parkway, the ordinance is void, because unreasonable, and in its effect prohibitive of traffic thus classified.

Same—Establishment.—Whether or not the parkway in question was established as such by assumption of authority over it by the park board, and by acquiescence therein on the part of the city council, in the absence of any express action as a body, quære.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; W. A. Kerr, Judge.

Jesse Rohart was convicted of violating an ordinance of the park commissioners of Minneapolis, and from an order denying a new trial he appeals. Reversed.

John W. Arctander, for appellant.

Frank Healy, City Atty., and C. J. Rockwood, for respondent.

LEWIS, J. The pertinent part of the ordinance here involved reads as follows: "* * * No vehicle, which, together with its load, weighs more than two thousand pounds, and which is in use for carrying goods, merchandise, building material, manure, dirt, earth, or other article or commodity, and which has tires less than six inches in width, shall pass or enter upon any park or parkway." It was held in the case of State v. Waddell, 49 Minn. 500, 52 N. W. 213, that in respect to a parkway to which the city had not acquired title as a part of its park system the board had no power to exclude the ordinary class of traffic, and confine the travel thereon to what may be termed park or pleasure travel. A distinction is made between streets and avenues of a park system to which the city has acquired title for such purposes and a street which has simply been designated a parkway by the board with the consent of the city council. In the one case the board has complete jurisdiction and power, not only to regulate, but to prohibit, general traffic; while in the other case it has no power to prohibit general traffic. It does not follow, however, that it has not the power to regulate such

traffic within a reasonable limit. Conceding that the avenue in question was a parkway, and could be used by the public for general purposes of travel and traffic, how far does the board's regulating power extend? If, in order to protect the roadbeds, it were necessary to prohibit heavy traffic in wagons with narrow tires, provided wider ones were reasonably obtainable, such requirement would not be unreasonable; but in this case the tire used by appellant was of the widest in common use carried in the market for such traffic. According to the evidence, the six-inch tire was not in common use, and was not found in the market ready-made, and only obtainable upon special order, and at extra expense. The evidence does not disclose that the roadway was in any manner damaged by appellant's wagon, nor does it appear that such traffic with 3¼ inch tires would tend to impair the same. Under these circumstances the ordinance contained an unreasonable and arbitrary requirement, which, in its effect, was prohibitive of that class of traffic. Such power the board of park commissioners did not possess, and in that respect the ordinance is void. Order reversed.

State ex rel. Padavano *v.* Fagan, Mayor.

(*Supreme Court of New Jersey, March 4, 1901.*)

[48 Atl. Rep. 998.]

Ordinance—Validity—Approval by Mayor.—Where a resolution was vetoed by the mayor and returned to the council, who altered it to meet one of the objections set out in the veto, and again passed it, the resolution as last passed could not become effective until again submitted to the mayor for his approval.

Mandamus to Compel City Officer to Sign Warrant for Money.—This court, in its discretion, will refuse a mandamus upon a city officer to sign a warrant for money, when it appears from the evidence that the relator should establish his right in a proceeding in which the city might present a defense.

(Syllabus by the Court.)

Application by the state, on the relation of Antonio Padavano, for a writ of mandamus to Lawrence Fagan. Writ denied.

Argued November term, 1900, before GARRISON and GARRETSON, JJ.

Leon Abbett, for relator.

James F. Minturn, for defendant.

GARRETSON, J. The relator had a contract to remove ashes and garbage from the streets of Hoboken for the year ending June 15, 1900, for the sum of $4,095 for the year, and has made a proposal to remove them for the next year for the sum of $4,845, but a new contract was not entered into with him until September 25, 1900. In the meantime the relator removed the ashes and garbage under an arrangement, as he claimed, with the members of the committee on streets, by which he was to receive so much per day for each team and man furnished. The street commissioner and the mayor both

testified that they understood that the relator was doing this work at the same rate as was called for by his contract which had expired. The relator, for his services, presented claims to the council covering the period from June 16th to June 30th, and from August 9th to September 26th, aggregating, as the figures showed, $2,176. When the claims were presented to the mayor, he vetoed them on the ground, as stated, that the contract price was $1,062.50 for three months, and that the claims presented were for $2,185 for three months, or $1,122.50 more than he was entitled to; and for the further reason that one bill was footed up so as to amount to $100 more than it should. Upon the return of the claims to the council they altered the footing so as to correct the bill, and then passed the resolution as though passing it over his veto, and this last resolution was never submitted to the mayor. We think that this was a new resolution, and could not become effective without the mayor's action. We also think that the evidence shows that the circumstances under which the alleged indebtedness was incurred were such as to justify this court, in its discretion, in refusing this writ of mandamus, and to require the relator to establish his right to the money he claims in a proceeding in which the city might present a defense. O'Hara v. Fagan, 56 N. J. Law, 279, 27 Atl. 1089. The mandamus will be refused.

Keith *v.* City of Covington et al.

(Court of Appeals of Kentucky, Feb. 13, 1901.)

[60 S. W. Rep. 709.]

Passage of Ordinance—Refusal of President of Council to Act—Election of President Pro Tempore.—Under Ky. St. § 3043, part of charter of cities of the second class, providing that, in the absence of the president of the board of councilmen, a president pro tempore shall be chosen by the board from among its own members, the president is "absent" when he vacates his seat, and refuses to act, and the board may then elect a president pro tempore, though the regular president remains in the room.

Appeal from circuit court, Kenton county.

"To be officially reported."

Action by Charles W. Keith against the city of Covington and others to test the validity of an ordinance. Judgment for defendants, and plaintiff appeals. Affirmed.

W. McD. Shaw, for appellant.

J. W. Bryan and F. J. Hanlon, for appellees.

Ex Parte Anderson.

(Supreme Court of California, Aug. 26, 1901.)

[66 Pac. Rep. 194.]

Passage of Ordinance—Submission to Voters—Board of Supervisors—Invalidity.—Const. art. 11, requires the legislature, by general and

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uniform laws, to provide for the election or appointment of county boards of supervisors, etc., and prescribes their duties. Section 11 provides that any county may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. St. 1897, § 2, declares that the powers of a county can only be exercised by the board of supervisors or their agents. Section 13 provides that whenever a petition signed by a certain number of legal voters shall be presented to the board of supervisors, asking that an ordinance, as set forth, be submitted to a vote of the qualified voters of the county, it shall be so submitted, and, if a majority of the votes cast favor the adoption, on such fact being proclaimed, the ordinance shall have the same force as though ordained by the supervisors: *held*, that section 13 is void, since the lawmaking power therein conferred is co-ordinate with that of the supervisors, without any restrictions or restraint the one on the other, and hence an ordinance passed in accordance therewith is of no effect.

Beatty, C. J., dissenting.

In bank. Application by one Anderson for a writ of habeas corpus against the justice's court of the township of Ventura. Granted.

H. L. Poplin and S. M. Swinnerton, for petitioner.

F. W. Ewing, Dist. Atty., for respondent.

C. C. Wright, E. C. Bower, and Lewis W. Andrews, amicus curiæ.

HENSHAW, J. Upon the one hand, there is conferred upon the board of supervisors, as has been the universal rule, full power to make all laws pertaining to the government of the county. Upon the other hand, this identical power is bestowed by the machinery of the ballot upon the voters of the county. When an ordinance is thus passed by ballot, it has no superior force, but has merely "the same and equal force and effect as though adopted and ordained by the board of supervisors." The right of the supervisors to repeal such ordinances is not taken away, and it is within their power to repeal them one after the other as soon as they shall have been adopted. Upon the other hand, it is equally the right of the people to re-enact them after such repeal. It is the old problem of the irresistible force meeting the indestructible barrier. So far as legislation is concerned, nothing could result but untold confusion. As the two sets of laws thus creating co-ordinate lawmaking powers without check, limitation, or restraint the one upon the other cannot, in the nature of our government, exist, it follows that one or the other of the provisions is invalid, and must fall. There can be no hesitation in declaring in this case that it must be section 13 of the county government act. By reason of the invalidity of said section, the ordinance adopted in accordance with it is likewise invalid, and the petitioner is entitled to his discharge. It is ordered accordingly.

City of Barnesville et al. *v.* Murphey et al.
Murphey et al. *v.* City of Barnesville et al.

(Supreme Court of Georgia, July 18, 1901.)

[39 S. E. Rep. 413.]

City Engaging in Liquor Business—Statute.—Under a legislative provision declaring that the municipal authorities of a named city "shall have the power and authority to regulate and control the sale [therein] of spirituous and malt liquors, wine and ciders for medicinal, mechanical and sacramental purposes only," such authorities have no power to embark the city upon its own account in the business of buying and selling spirituous or other liquors.

Appeal and Error—Divided Court.—When any decision rendered by a trial court is under review here, and is to be passed upon by the "court as a whole," and the six justices are evenly divided in opinion, such decision stands affirmed by operation of law.

(Syllabus by the Court.)

Error from superior court, Pike county; E. J. Reagan, Judge.

Action by A. A. Murphey and others against the city of Barnesville and others. Judgment for plaintiffs, and defendants bring error, and plaintiffs assign cross error. Affirmed.

W. W. Lambdin, J. F. Redding, and Estes & Jones, for plaintiffs in error.

C. J. Lester and R. A. Murphey, for defendants in error.

LUMPKIN, P. J. Certain citizens and taxpayers of the city of Barnesville brought against the municipal authorities thereof an equitable petition to enjoin them from further operating a dispensary for the sale of spirituous and other intoxicating liquors, which they had for several years been conducting in the name and behalf of the city, and also from paying bills amounting to several thousand dollars, which divers persons claimed were due to them for liquors sold and delivered to the city, and used in conducting the dispensary. The liquor dealers holding the claims just mentioned were, by amendment, made parties defendant. They and the municipal authorities set up by way of defense that the dispensary had been legally established and operated, and that the claims in question constituted a valid and binding indebtedness of the city, and therefore should be paid. At the interlocutory hearing there was evidence tending to show that money to the aggregate amount of the liquor bills above referred to, which had been derived from the sale of liquors furnished by these dealers, was used in paying off and discharging legitimate demands against the municipality. The judge rendered a decision granting an injunction restraining the further operation of the dispensary, but refusing to enjoin the payment of the alleged indebtedness. The municipal authorities excepted to so much of the decision as granted the injunction against them, and the plaintiffs excepted to the refusal of the judge to enjoin the municipal authorities from paying the claims of the liquor dealers.

1. All of us agree that the judge was right in enjoining the

further operation of the dispensary. The only legislation upon which the municipal authorities based their alleged right to carry on a dispensary is embraced in the second section of the act of October 29, 1889, which declares that "the mayor and council of Barnesville shall have the power and authority to regulate and control the sale in Barnesville of spirituous and malt liquors, wine and ciders for medicinal, mechanical, and sacramental purposes only." Acts 1889, p. 1369. We hold, without hesitation or difficulty, that this statutory provision did not confer upon the mayor and council of Barnesville any right whatever to embark the municipality in the business of buying and selling liquors. At most, their only power thereunder was to authorize an individual or individuals, on his or their own account, to open and conduct a dispensary under municipal regulation. The question in hand is controlled by the decision which this court rendered in the case of Mayor, etc., v. Putnam, 103 Ga. 110, 29 S. E. 602, in which it was held that express legislative authority was requisite to the lawful establishment and conduct of a liquor dispensary by municipal authorities. On pages 114, 115, 103 Ga., and page 604, 29 S. E., Mr. Justice Cobb cited the case of Chambers v. Town of Barnesville, 89 Ga. 739, 15 S. E. 634, and pointed out the distinction between the ruling therein made and the decision rendered in the Putnam Case. Referring to the Chambers Case, he said: "The right of the city authorities to operate a dispensary directly was not involved in that case, and it does not appear from the record that the dispensary was operated directly by the city. The sole question involved was whether, if the city of Barnesville had established a lawful dispensary, they could prohibit by ordinance, under a penalty, the sale of liquors by persons other than those whom they placed in charge of the dispensary." The ruling in the Putnam Case was cited approvingly by Mr. Justice Lewis in Plumb v. Christie, 103 Ga. 688, 30 S. E. 759, 42 L. R. A. 181, and its correctness was also fully recognized in the case of Henderson v. Heyward, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366.

2. The six justices of this court are evenly divided in opinion as to whether or not the trial judge erred in refusing to enjoin the municipal authorities of Barnesville from paying the claims of the liquor dealers. This being so, and the case being for decision by the court as a whole, the judgment of the court below on this point stands affirmed by operation of law. Judgment on both bills of exceptions affirmed. All the justices concurring.

Graves et al. *v.* City of Biloxi.

(*Supreme Court of Mississippi, April 15, 1901.*)

[29 So. Rep. 768.]

Public Markets—Authority of Market Clerk to Lease Stalls.—A city ordinance placed the public market under the supervision of the

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market clerk, whose duty it was to lease the stalls at such price and for such length of time as might be fixed by the mayor and aldermen by resolution from time to time, provided such stalls should not be rented for less than a minimum price fixed; and by a section of such ordinance fixed such price: *held*, that approval of his action in renting stalls at the minimum price was not necessary, and the power to lease at such price could not be revoked as to leases already made, and paid in advance.

Appeal from chancery court, Harrison county; N. C. Hill, Chancellor.

Suit by H. T. Graves and others against the city of Biloxi. From a decree for defendant, plaintiffs appeal. Reversed.

W. H. Maybin and Neville & Griffith, for appellants.

Harper & Potter, for appellee.

TERRAL, J. We are inclined to the opinion that the ordinance of the city of Biloxi authorized market clerk Moseley to rent the stalls of the city market at the minimum prices fixed by it, and that Graves, Swetman, and Borries, who took possession of said stalls under said contract, and paid the purchase price, are entitled to hold the same; and the city authorities may not deny the market clerk to have the power with which he was apparently clothed by their ordinance. The several sections of Ordinance No. 198, especially sections 2, 8, and 9, would seem to authorize the market clerk to rent out the stalls of the market at the prices fixed by section 8; and this authority of the market clerk, when exercised by renting of the stalls, may not be revoked as to leases made before such revocation. Nor do we think any approval of the action of the market clerk was necessary to its validity. The decree dissolving the injunction is reversed, the injunction is reinstated, and the case is remanded for further proceedings.

Hood *v.* Mayor, etc., of City of Griffin.

(*Supreme Court of Georgia, March 27, 1901.*)

[38 S. E. Rep. 409.]

Criminal Ordinance—Intoxicating Liquors—Sufficiency of Warrant.—Where a municipal ordinance declared that "it shall be unlawful for any person * * * to keep for sale, barter or exchange, any spirituous, malt or vinous liquors within the corporate limits of" a named city, and prescribed a penalty for the violation of the same, and the warrant upon which an accused person was tried in the municipal court alleged that he, upon a day named, did, in such city, keep for sale a quantity of spirituous liquors, there was no merit in the point that the accused was charged with no offense, nor in the contention that, if any offense was charged, it was the violation of a penal statute of the state.

(Syllabus by the Court.)

Error from superior court, Spalding county; E. J. Reagan, Judge.

D. T. Hood was convicted of violating a city ordinance of the city of Griffin, and brings error. Affirmed.

T. E. Patterson and T. W. Thurman, for plaintiff in error.

W. E. H. Searcy, for defendant in error.

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FISH, J. There is no merit in the contention that the warrant charged no offense. The ordinance in question defines an offense, and provides for the punishment of those who commit it, and the warrant charged the accused with having committed this offense. This very ordinance has been decided to be valid. Cunningham v. City of Griffin, 107 Ga. 690, 33 S. E. 664. See, also, in this connection, Paulk v. City of Sycamore, 104 Ga. 728, 31 S. E. 200; Brown v. Town of Social Circle, 105 Ga. 834, 32 S. E. 141; Papworth v. City of Fitzgerald, 106 Ga. 378, 32 S. E. 363. Nor, under the decisions in the above-cited cases, is the ground that the warrant charged an offense against a penal statute of the state well taken. It was held in Paulk v. City of Sycamore, supra, that "possession of intoxicating liquors for the purpose of selling them contrary to law is not a crime punishable under the laws of this state; and therefore it is competent for the authorities of a municipal corporation, when authorized by its charter, to adopt an ordinance declaring such possession to be an offense against the city, and to provide that the offender shall be punished for the same." This decision was followed in the other cases.

City Council of Abbeville *v.* Leopard.

(*Supreme Court of South Carolina, July 12, 1901.*)

[39 S. E. Rep. 248.]

Prosecution under City Ordinance—Process—Constitutional Provision.—Const. art. 5, § 31, providing that all writs and processes shall run, and all prosecutions shall be conducted, in the name of the state, does not prohibit a prosecution for violation of a city ordinance by the city council.

Same—Charter Provision—Concealed Weapons.—A city charter, permitting a municipality to pass such ordinance for the safety of the citizens as may be necessary, and providing that no fine or penalty shall exceed $100 or imprisonment for a longer period than 30 days, authorizes an ordinance against carrying a pistol within the city concealed about the person.

Appeal from general sessions circuit court of Abbeville county; Benet, Judge.

J. D. Leopard was convicted of violating an ordinance of the city council of the city of Abbeville by carrying concealed weapons. From an order sustaining defendant's appeal reversing the judgment, the city council appeals. Reversed.

M. P. De Bruhl, for appellant.

Ellis G. Graydon, for appellee.

POPE, J. There are only two questions of any moment involved in this appeal, viz.: First. Is the proceeding of the city council of Abbeville void by reason of its failure to have its process run in the name of the state of South Carolina? Second. Was the ordinance of said city council of Abbeville within the powers with which it was invested by the general assembly of this state?

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We will dispose of these questions in their order. The circuit judge was so impressed with the language of the constitution of this state, adopted in the year 1895, and set out in section 31 of article 5, that he felt bound to deny to the city council of Abbeville the right, in its corporate name, to prosecute the defendant for the violation of one of its ordinances. The language employed in said section 31 of said article 5 was as follows: "All writs and processes shall run and *all prosecutions* shall be conducted in the name of the state of South Carolina." (Italics ours.) We fear that the learned circuit judge for the moment overlooked the distinction between offenses against the general laws of the state, which affect and govern its entire citizenship, or, to be more accurate, all of its inhabitants, and those offenses which consist in a breach of the laws governing the inhabitants of a city or town in this state within the corporate limits of such city or town. This distinction was recognized and enforced as early as the year 1787, as will be seen in the case of McMullen v. City Council, 1 Bay, 46. In the case cited the city council of Charleston had assumed jurisdiction to try the defendant for a violation of a state law. The court denied it any such power. It was then declared: "As to the conviction, this was for the offense of selling spirituous liquors,—an offense neither cognizable by them either under their charter or the act of 1784, any more than homicide or manslaughter. It is not an offense against any of their by-laws. Therefore their power to commit did not extend to this offense. It is an offense against the public revenue act of the state. This act is not one of the by-laws of the city corporation, but a public law, cognizable only by the supreme court throughout the state." The practice of prosecuting offenses against the ordinances of a city or town, in the name of the city or town council of the particular city or town affected, is hoary with age. It has existed far beyond the century last passed. No particular value can be ascribed to the phraseology used in section 31 of article 5 of the constitution of 1895, for the identical language was employed in section 31 of article 4 of the constitution of 1868. And an examination of the second section of article 3 of the constitution of 1790 will show this language as there employed: "The style of all process shall be 'The State of South Carolina.' All prosecutions shall be carried on in the name and by the authority of the state of South Carolina." See 1 St. at Large, p. 189. The power is always given to municipal corporations in this state to sue and be sued by their corporate names. This has always been accepted as authorizing a prosecution in the corporate name for an infraction of municipal ordinances, as the multitude of cases in the reports of this state shows. Such being the law in this state, the constitution of the year 1895 retained all such laws. See section 10 of article 17. Such being our view, we sustain all of the exceptions relating to this question.

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We will now examine the question touching the power of the city council of Abbeville to pass the ordinance in question. Whenever the power of the city council is challenged, it must always be able to lay its finger upon some express grant of power by the general assembly of this state. Inherently it has no power. By referring to the act incorporating the city of Abbeville, as found at page 1134 of 21 Statutes at Large of this state, at section 6, we find such municipality was clothed with the power to make ordinances, "* * * and such other matters pertaining to the concerns of said corporation as shall be proper, necessary or advisable for the preservation or safety of the peace, order, comfort, health, convenience and welfare of the citizens of said city; may fix and impose fines and penalties for the violation of law or its ordinances, but no fine or penalty shall exceed $100, or imprisonment in the guard house for a longer period than thirty days. * * *" We consider this a grant of power to make an ordinance against carrying a pistol concealed about the person. But, if there was any doubt as to the foregoing grant of power, such doubt is set at rest by the act of 1896, by which said city of Abbeville is clothed with full power to do so. See 22 St. at Large, p. 67, which last was made to apply to the city of Abbeville by the provisions of an act passed in the year 1897, and found in 22 St. at Large, p. 464. The act of 1896, just referred to, at section 11, gives town councils full power to pass an ordinance such as that in question. Although we hold that the general assembly of this state has clothed the city council of Abbeville with power to pass the ordinance for the violation of which the defendant was convicted, yet we hold, at the same time, that it had no power to affix the penalty of a forfeiture of the pistol used by defendant. No such power is conferred by the constitution. But this does not affect the defendant, who was only sentenced to pay a fine or be imprisoned. It is no longer an open question in this state as to the power of a municipal corporation by its ordinances to make an act or acts offenses within its chartered limits which are already a violation of state laws. See State v. Williams, 11 S. C. 292; City Council v. O'Donnell, 29 S. C., at page 368, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; also City of Greenville v. Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725. The exceptions of appellant, where conformable to the foregoing views, are sustained. It follows, therefore, that the judgment of the circuit court must be reversed.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded for the enforcement of the judgment of the city council of Abbeville against the defendant, J. D. Leopard.

City of Jordan *v.* Nicolin.

(*Supreme Court of Minnesota, Nov. 15, 1901.*)

[87 N. W. Rep. 915.]

Saloon Open after Hours—Ordinance Punishing Offense Covered by General Law.—The defendant was convicted of the offense of keeping his saloon open after 11 o'clock at night, contrary to the ordinance of the city: *held*, acts which are punishable under the general laws of the state may also be punished by municipal ordinance, and the latter is valid though the punishment prescribed in each be not the same.

Same—Same—Validity.—The ordinance here in question is valid, and the complaint for its violation does not charge two offenses.

(Syllabus by the Court.)

Appeal from district court, Scott county; Francis Cadwell, Judge.

Henry Nicolin was convicted of violating an ordinance of the city of Jordan, and appeals. Affirmed.

F. C. Irwin, for appellant.

F. J. Leonard, for respondent.

START, C. J. The defendant was convicted in justice court of the offense of keeping his saloon open after 11 o'clock at night, contrary to the ordinance of the city of Jordan. He appealed from the judgment to the district court of the county of Scott upon questions of law alone. Judgment was entered in the district court affirming the judgment of the justice court, and the defendant appealed therefrom to this court.

The assignments of error raise the question of the validity of the ordinance by virtue of which the defendant was convicted. The city council of the city of Jordan has full power to impose penalties and punishment and enforce the same against any person who may violate any ordinance enacted by it, and such ordinances are declared to have the force of law, provided they be not repugnant to the laws of the United States or of this state; also by ordinance to license and regulate all persons dealing in intoxicating liquors. Sp. Laws 1891, c. 4, subc. 4, §§ 4, 5. So much of the ordinance in question as is here material is to the effect that any person licensed to deal in intoxicating liquors shall keep his saloon closed from 11 o'clock at night of each day until 5 o'clock the next morning, and no intoxicating liquors shall be sold in the saloon during the time it is required to be kept closed, and, further, that any person violating any of the provisions of the ordinance shall pay a fine of not less than $10 nor more than $100, and costs, and in default of such payment be committed to the county jail until payment is made, not exceeding 90 days. The complaint upon which the defendant was convicted charged that he was duly licensed to sell intoxicating liquors, and kept his saloon open, and not closed, between the hours of 11 o'clock of the night of a day named and 5 o'clock the next morning, contrary to the ordinance, and "against the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota."

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The defendant here urges that this ordinance is void because it is in conflict with the general laws of the state relating to the sale of intoxicating liquors, in that the punishment prescribed for a violation of the ordinance may be a fine of $100, the payment of which may be enforced by imprisonment in the county jail, while the punishment ordained by the statute cannot exceed a fine of $50, without imprisonment for its enforcement. Gen. St. 1894, §§ 2012, 2013. The claim that the fine imposed by the statute cannot be enforced by imprisonment is without foundation, for, in all cases of the imposition of a fine pursuant to a statute as punishment for any offense, payment of the fine may be enforced by imprisonment in the county jail. Id. § 5960; State v. Peterson, 38 Minn. 143, 36 N. W. 443. The fact that the maximum fine which may be imposed for a violation of the ordinance is greater than can be imposed for a violation of the statute does not render the ordinance repugnant to the statute, for acts which are punishable under the general laws of the state may also be punished by municipal ordinance, and the latter is valid though the punishment prescribed in each be not the same. State v. Ludwig, 21 Minn. 202; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531.

It is further claimed by the defendant that the complaint states two offenses, if any. The only basis for this claim is that the complaint concludes contrary to the statute, as well as against the ordinance. The objection is not well taken, for the complaint shows upon its face that the defendant is charged with a violation of the ordinance only. The defendant's other assignments of error have been considered, and found to be so obviously without merit that it is unnecessary to specially refer to them.

Judgment affirmed.

City of Jordan *v.* Nicolin.

(*Supreme Court of Minnesota, Nov. 15, 1901.*)

[87 N. W. Rep. 916.]

Saloon Open after Hours—Complaint—Necessary Averment.—In a prosecution for keeping a licensed saloon open after 11 o'clock at night, contrary to an ordinance, it is necessary to show that the person charged with such offense had a license for the sale of intoxicating liquors at such place.

Judgment Not Sustained by Evidence.—The evidence in this case does not sustain the judgment convicting the defendant, for there was no competent proof that he was a licensed saloon keeper.

(Syllabus by the Court.)

Appeal from district court, Scott county; Francis Cadwell, Judge.

Henry Nicolin was convicted of violating an ordinance of the city of Jordan, and appeals. Reversed.

F. C. Irwin, for appellant.

F. J. Leonard, for respondent.

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START, C. J. The defendant was convicted in justice court of a second violation of the same ordinance which we held to be valid in the case of City of Jordan v. Nicolin (in the opinion filed herewith) 87 N. W. 915. He appealed from the judgment of the justice to the district court of the county of Scott, and from the judgment of the district court affirming the conviction he appealed to this court.

There is one question raised by the record in this case which was not presented by the record in the other case. The question arises upon the claim of the defendant that the prosecution failed to prove by any competent evidence that the defendant was a person licensed to deal in intoxicating liquors, and had a license for his saloon, which he was charged with having kept open contrary to the ordinance. It was necessary to prove this fact, for the ordinance is directed against parties licensed to sell intoxicating liquors, and not against persons keeping open unlicensed saloons. The gist of the alleged offense in this case is the keeping of a licensed saloon open contrary to the ordinance. In this respect it is an exception to the rule that requires the defendant to prove his license, as a part of his defense, when he is charged with doing an act without having such license. On the trial the prosecution attempted to show that the defendant held a license for the place he was charged with unlawfully keeping open. Proper record evidence was offered and received showing that the defendant made application for a license, gave the bond, that the bond was approved, and that the city council granted his application upon the payment by him into the city treasury of the sum of $500. But as to whether he ever paid the license fee, or whether the license was ever in fact issued, no evidence was given, except the oral evidence of the city clerk, which was this: "Q. Has a license been granted to the defendant to sell liquor under that ordinance within the past year? (Objected to as incompetent, irrelevant, and immaterial, and no foundation laid, and not the best evidence. Objection overruled. Exception taken.) A. Yes. Q. And at the place described in the application? (Defendant makes same objection. Objection overruled. Exception taken.) A. Yes." The objection to these questions should have been sustained, for the evidence sought to be elicited thereby was presumptively not the best evidence. It follows that there was no competent evidence that the defendant was a licensed saloon keeper, and that the judgment is erroneous because it is not justified by the evidence.

Judgment reversed and case remanded, with direction to the district court to enter judgment reversing that of the justice.

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State *v.* Grimes.

(Supreme Court of Minnesota, June 14, 1901.)

[86 N. W. Rep. 449.]

Constitutional Law—Power of Legislature to Provide for Summary Punishment under Municipal Ordinance.—City of Mankato *v.* Arnold, 30 N. W. 305, 36 Minn. 62, and subsequent cases, to the effect that in prosecutions under municipal ordinances it is within the power of the legislature to provide for trials of the accused in a summary manner, and without a jury, followed.

Same—Same—Construction of Ordinance.—The punishment prescribed by the ordinance in question was that, upon conviction of the offense therein provided for, the accused "be punished by a fine not exceeding $100, nor less than $10, or by imprisonment in the work house of the city of Minneapolis for a term not exceeding ninety days, nor less than ten days": *held*, that the municipal court was authorized to fine or imprison, in its discretion, under and within the limits of this provision.

Conviction and Sentence—Sufficiency of Record.—*Held*, that the conviction and sentence in said court were clearly and distinctly stated in the minutes of the court, and also the offense of which conviction was had, and these minutes were sufficient as a judgment.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; W. A. Kerr, Judge.

John Grimes was convicted of violating a city ordinance, and appeals. Affirmed.

Henry E. Barnes, Jr., for appellant.

W. B. Douglas, Atty. Gen., Frank Healy, H. D. Dickenson, and Edward F. Waite, for the State.

COLLINS, J. In the municipal court defendant was convicted, and sentenced to 90 days' imprisonment in the city workhouse, of the offense described in the second paragraph of section 2 of an ordinance of the city of Minneapolis approved Feb. 27, 1894, which paragraph reads as follows: "No person shall keep any house or place, or suffer or allow any house or place to him or her belonging, or by him or her occupied, or of which he or she has the control, to be kept for the purpose of gambling or gaming or fraudulent practices, or to be kept or resorted to for the purpose of betting, or wagering any money or valuable thing on any game or device, or the happening of any event, or the result of any event." He appeals from the judgment of conviction and sentence, and from a denial of his motion for a new trial. Upon appeal his counsel urges: First, that it was error to deny his demand for a jury trial; second, that the ordinance under which he was convicted does not authorize imprisonment in the workhouse without the option of a fine; and, third, that the judgment from which he appeals is void upon its face.

1. The first objection has been considered and disposed of in this court, in at least three cases, adversely to the present contention. It has been held in these cases that the constitutional provisions upon which counsel relies, in effect, that in all criminal prosecutions the accused shall enjoy the right to a trial by jury, are not applicable in prosecutions of offenses

committed against village or city ordinances, and triable summarily by or before justices of the peace, or in the municipal courts of said municipalities. See City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531; State v. Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33. That this court is in line with many others upon this proposition will be seen upon examination of 6 Am. & Eng. Enc. Law (2d Ed.) 978, and cases cited. Counsel for defendant has offered no new line of reasoning or argument in support of his contention, and we regard the question as foreclosed by the decisions hereinbefore mentioned, unless some point not hitherto suggested is presented for our consideration.

2. Prior to the passage of the ordinance in question, the acts therein prohibited were, if committed, punishable, under another ordinance, by fine, and, if this fine was unpaid, by imprisonment in the workhouse. It is conceded that while the older ordinance was in force the court could not sentence to imprisonment without the option of a fine. But on February 27, 1894, this ordinance was amended and the clause therein prescribing punishment was made to read as follows: "Any person who shall violate any provision of this ordinance, shall, upon conviction thereof, before the municipal court of said city, be punished by a fine not exceeding $100 nor less than $10, or be imprisoned in the workhouse of the city of Minneapolis for a term not exceeding ninety day nor less than ten days." The contention of counsel is that this language should be construed as meaning that the punishment shall be by a fine not exceeding $100 nor less than $10, or, in default of payment of such fine, by imprisonment for a period not exceeding 90 days and not less than 10 days. The alteration in that part of the ordinance prescribing the imprisonment is significant, and has some purpose and meaning. If it was not designed to empower the court to fine or imprison, in its discretion,—to allow and authorize the infliction of a money fine, or, instead thereof, a term of confinement in the workhouse,—it means nothing at all, and was superfluous. The marked change in the language used clearly shows that, with express intent, the penalty attached was made in the alternative, fine or imprisonment, as deemed best by the court, in the exercise of its discretion. This noticeable departure from the previously existing policy when offenders were convicted rendered all prior provisions as to punishment functus officio. The new superseded the old, and obviously was so designed.

3. From the minutes of the court, as certified up, the nature of the offense charged clearly and definitely appeared, and that defendant was adjudged guilty, and sentenced to be imprisoned in the workhouse in the city of Minneapolis for a term of 90 days. We fail to see wherein these minutes of the conviction and sentence, as entered by the clerk, are defective or insufficient. The entries would have been sufficient in district

court under Gen. St. 1894, § 7398, in effect that, when judgment upon conviction is rendered, the clerk of the court shall enter the same upon his minutes, stating briefly the offense for which the conviction is had. The record was ample and complete in this respect. Order and judgment affirmed.

City of Topeka *v.* Wood.

(*Supreme Court of Kansas, April 6, 1901.*)

[64 Pac. Rep. 630.]

Criminal Law—Right of City to Appeal.—Where a defendant is convicted in the police court under a city ordinance of a city of the first class, and appeals to the district court, and the district court quashes the complaint, dismisses the prosecution, and discharges the defendant, chapter 75, Laws 1891, does not confer upon the city the right of appeal to this court.

(Syllabus by the Court.)

Appeal from district court, Shawnee county; Z. T. Hazen, Judge.

William Wood was convicted of violating a city ordinance, and on appeal the complaint was quashed, and the city appeals. Dismissed.

W. A. S. Bird, for appellant.

G. C. Clemens, for appellee.

POLLOCK, J. Appellee Wood was convicted in the police court of the city of Topeka for a violation of ordinance No. 2061 of said city, appealed to the district court of Shawnee county, and there filed his motion to dismiss the prosecution, and for his discharge, upon the ground that said ordinance is void for want of authority in the city to enact the same. This motion was sustained, the complaint quashed, case dismissed, defendant discharged, and costs adjudged against the city. City appeals to this court. Appellee challenges the jurisdiction of this court.

The city claims the right of appeal to this court in this case by virtue of chapter 75, Laws 1891. The right of appeal in the city does not exist independent of this act. City of Salina v. Wait, 56 Kan. 283, 43 Pac. 255. Does this act confer the right of appeal upon the city in this case? We think not. The title to the act is, "An act relating to cities of the first class, and providing for appeals from the police court of such cities in certain cases." The act reads: "Section 1. Appeals from the police court of a city of the first class to the district court and from there to the supreme court may be taken by the city in the following cases, and no other: First, upon a judgment for the defendant, on quashing a complaint; second, upon an order of the police judge arresting the judgment; third, upon a question reserved by the city." The title contains no general terms, but is expressly restricted to appeals by the city from the police court in the event certain rulings are therein made against the city and in favor of the accused,—

a right which theretofore did not exist in the city. The body of the act attempts to extend this right of the city not only to appeals from the police court, in the event that these certain rulings are made in favor of the accused and against the city, but also to confer upon the city the right to appeal from the district court to this court in the event the ruling of the district court is again in favor of the defendant and against the city, and in so doing violates section 16, art. 3, of the constitution; for it cannot be said that the second right of appeal by the city, not from the police court to the district court, but from the district court to this court, is clearly expressed in this title. Indeed, it cannot be said that it is expressed or included in this title at all. Again, in this case the city was not called upon, neither did it exercise any right of appeal from the police court; the judgment of that court being in favor of the city and against the defendant. The ruling of the district court, however, was against the city and in favor of the defendant, and it is from this ruling that the city appeals. The right of appeal by the city in such event is not only not clearly expressed in the title of the act, but is not contemplated by the act itself. It follows that the right of appeal by the city in this case must be denied, and the appeal dismissed. It is so ordered. All the justices concurring.

Treasurer of City of Elizabeth et al. *v.* State (Central R. Co. of New Jersey, Prosecutor).

(*Supreme Court of New Jersey, June 10, 1901.*)

[49 Atl. Rep. 682.]

Police Court—Nature of Proceedings—Recitals in Record.—Proceedings in a police court for violation of a city ordinance are of a summary nature, and the conviction must recite the facts necessary to show a legal conviction.

Same—Insufficiency of Record.—The "judgment," so called, returned in this case, does not show the charge against the defendant, or that the magistrate found the defendant guilty of any offense.

(Syllabus by the Court.)

The Central Railroad Company of New Jersey was convicted under an ordinance of the city of Elizabeth, and the state, on its prosecution, brings certiorari. Reversed.

Argued February term, 1900, before GUMMERE and FORT, JJ.

John L. Conover, for prosecutor.

James C. Connolly, for defendants.

FORT, J. This writ brings up a conviction of the defendant founded upon a complaint for the violation of section 187 of the Code of General Ordinances of the City of Elizabeth, adopted January 24, 1895. The charge in the complaint is for "obstructing Broadway, between Front and Third streets, in said city, by placing a train of freight and coal cars thereon," for the whole of Sunday, the 8th day of July, 1900. The

record returned shows no legal conviction of the defendant. The conviction fails to set out any of the requisites to make it good. Proceedings in a police court of a city, without a jury, on a complaint for the violation of a city ordinance, are of a summary nature; and the conviction, as stated and signed by the magistrate, must contain everything to show a legal conviction. Salter v. City of Bayonne, 59 N. J. Law, 129, 36 Atl. 667. It is the same in cases under the disorderly act. Preusser v. Cass, 54 N. J. Law, 522, 24 Atl. 480. The testimony sent up in this case was evidently taken stenographically, and at the end of it (evidently a note of the stenographer) appears the following: "The court found the defendant guilty of obstructing Broadway with railroad cars, between Front and Third streets, on July eighth, nineteen hundred, and imposed a fine of twenty-five dollars, in accordance with section 188 of the Code of General Ordinances of the City of Elizabeth." This is, of course, of no legal force whatever. At another part of the return the following appears: "Judgment. Aug. 17th. City of Elizabeth in the case of violation of city ordinance, section 187, Code of General Ordinances, section aforesaid, on hearing the evidence of plaintiff and defendant, held the Central Railroad guilty, by obstructing said Broadway, by allowing cars to stand on the said, on Broadway, on the eighth day of July, nineteen hundred, imposed fine of $25.00 (twenty-five dollars). Penalty for violation of said ordinance, under section one hundred and eighty-eight. Owen P. Mahon, Police Justice. August 17th, 1900." This is not sufficient under the cases above cited. The conviction, as signed by the justice, must embody the complaint, showing the offense charged, or at least so substantially as to clearly show the offense with which the defendant was charged, the names of the witnesses, and sufficient of the evidence to show the offense was committed, and of what offense the defendant was convicted. In this "judgment," so called, above set out, no recital of what the complaint against the defendant was appears at all. All it can be said to state on that subject is, "City of Elizabeth in the case of violation of city ordinance, section 187, Code of General Ordinances, section aforesaid." What this means, it would be difficult to determine. That it does not recite any charge against the New Jersey Central Railroad is clear. Nor is there anything in the record sent up showing that the magistrate found the defendant guilty of any offense, unless the statement of the stenographer above referred to can be so considered; but that, of course, has no force whatever. The conviction is set aside.

Chandler *v.* Town of Johnson City.

(*Supreme Court of Tennessee, Nov. 17, 1900.*)

[59 S. W. Rep. 142.]

Fixing Salary of City Official—Charter Provisions—Ordinance.—Johnson City charter provided that the city board of mayor and alder-

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men should elect a recorder on the first Monday in April, for a certain term (they also to fix such officer's salary, which should not be changed during his incumbency); that the regular meetings of the board should be held on the first and third Thursdays of each month; and that all ordinances should be read three times, on three different days, before becoming laws. The board's code of laws declared that such board should fix the salary at their first meeting after their qualification, and before the officer's election. Complainant was elected recorder on a certain date, prior to which the salary had been determined by resolution; and on the day immediately following his election the board passed an ordinance fixing such salary, the amount being less than that paid to prior incumbents. Complainant accepted the office and qualified, and thereafter accepted the salary under protest, demanding the amount paid his predecessor: *held*, that the word "ordinance," as used in the charter, was synonymous with "resolution," and hence complainant was bound by the ordinance fixing his salary, since the meeting at which it was passed was but a continuation of that of the day previous, and the ordinance was passed before he qualified.

Appeal from chancery court, Washington county; John P. Smith, Chancellor.

Action by G. C. Chandler against the town of Johnson City. From a decree of the court of chancery appeals affirming a decree in favor of defendant, plaintiff appeals. Affirmed.

H. H. Carr and G. T. Lee, for appellant.

Isaac Harr and S. E. Miller, for appellee.

WILKES, J. The first assignment of error is as to the technical language of the demurrer, which is that the board of mayor and aldermen, under the charter and ordinance, had the authority and power to fix the fees and salaries of all officials elected or appointed by the board, it being the duty of each board, under the ordinance set out, to fix the compensation of its own appointees, and, having fixed the compensation at $500 per annum complainant is bound by it; and, second, that, having accepted payment at the rate, he is estopped from claiming more. The first ground of demurrer is somewhat ambiguous, and capable of two different constructions, but we are of opinion that it sufficiently raises the question of the legality of the action of the board which is complained of. There is a contradiction between the charter of the city and its ordinances, in this: That the ordinance provides that the board of mayor and aldermen shall at its first meeting after the election and qualification fix the salaries of officers by ordinance, while the charter provides that all ordinances shall be read three times on three different days, before they become laws. It is evident that the word "ordinance," as used, was intended to be synonymous with "resolution"; and the exhibits filed with the bill show that previous to the election of complainant the incumbent's salary had been fixed by motion or resolutions in open board. If it be insisted that the board should at its first meeting fix the salary by ordinance, then it is evident that this has not been done, and the complainant cannot recover upon this theory; and, if it be contended that the former salary was continued,

complainant is confronted by the provision that each board should fix the salaries of its own officers by ordinance. It is, we think, evident, or may fairly be presumed, that the meeting of the 2d of April was but an adjourned or continued meeting from the 1st, as regular periodical meetings of the board would not be held so near together. The charter provides that the regular meetings of the board should be held on the first and third Thursdays of each month, and the bill does not aver that these two meetings on the 1st or 2d of April were regular meetings of separate sessions. We conclude that the fixing of the recorder's salary in 1894 did not have the effect of a formal ordinance or law; that it was a substantial compliance with the general ordinance, requiring the salary to be fixed in advance of the election, that it should be fixed before the party elected had qualified and been inducted into office, and, as was done in this case, within 24 hours after the election. The salary having been thus fixed, as we think, substantially correctly, and the complainant having afterwards qualified and been inducted into office, and having continued therein and received the salary of $500 per annum, he is estopped to claim more. We are of opinion that there is no error in the decree of the court of chancery appeals, and it is affirmed.

Mayor, etc., of City of Baltimore et al. *v.* Lyman.

(Court of Appeals of Maryland, Feb. 8, 1901.)

[48 Atl. Rep. 145.]

Public Schools—Superintendent—Not a City Officer — Eligibility.— The superintendent of public instruction in the city of Baltimore, being appointed at the pleasure of the board of school commissioners, in pursuance of the power conferred on it by City Charter (Acts 1898, c. 123) § 100, is merely an employee of that department of the city government, and not a "municipal official," within section 26 of the charter, which provides that all municipal officials shall be registered voters of the city; and hence the fact that one not a registered voter was appointed was no ground for restraining payment of his salary.

Appeal from circuit court No. 2 of Baltimore city.

Edgar H. Gans, William A. Fisher, and Olin Bryan, for appellants.

Karl A. M. Scholtz and Geo. P. Mister, for appellee.

BRISCOE, J. We are, therefore, all of the opinion that section 26 of chapter 123 of the Acts of 1898, providing that all municipal officials, except females, shall be registered voters of the city of Baltimore, has no application to the position of superintendent of public instruction. It follows, then, that the order of the court below overruling the demurrer to the bill will be reversed, the demurrer sustained, and the bill dismissed. Order reversed, demurrer sustained, and bill dismissed, with costs.

People ex rel. Grogan *v.* York et al., Police Commissioners.

(Court of Appeals of New York, April 26, 1901.)

[60 N. E. Rep. 258.]

Dismissal from Police Force—Certiorari—Return.—On certiorari to review the proceedings of police commissioners in dismissing relator from the police force, where the return shows affirmatively that relator had no notice of, and there was no competent proof of, the charges, and the dismissal was consequently invalid, the contention that the writ must be dismissed, because relator did not set up the invalidity of a claim, not made until two years after the petition was filed, that relator had ceased to be a member of the police force for absence without leave, and which claim had no connection with the act for which relator was dismissed, was without merit.

Appeal from supreme court, appellate division, First department.

Certiorari by the people, on the relation of Thomas R. Grogan, to review the decision of Bernard J. York and others, police commissioners of the city of New York. From an order of the appellate division (69 N. Y. Supp. 1142) affirming the action of the defendants in dismissing relator from the police department, he appeals. Reversed.

Louis J. Grant, for appellant.

John Whalen, Corp. Counsel (Theodore Connoly and Terence Farley, of counsel), for respondents.

MARTIN, J. (after stating the facts). On the 20th of December, 1897, the relator, a member of the police force of the city of New York, was dismissed upon the sole ground that he failed to attend roll call on the 19th of the preceding October. He had no notice of the hearing upon the charges made against him until two days after the time appointed therefor, and it is admitted there was no competent proof to sustain the charges. The dismissal was based upon unverified statements alone, and was, consequently, invalid. People v. Board of Police Com'rs, 155 N. Y. 40, 49 N. E. 257. Thus it was conclusively shown that the relator was improperly dismissed, and that the action of the commissioners was invalid, and should have been set aside. But the commissioners, to sustain such dismissal, applied to the supreme court for, and obtained, leave to serve a further or amended return by setting up that upon the day of the pretended trial the relator had ceased to be a member of the police force by reason of his absence for more than five days without leave. This attempt was made, but finally resulted in showing affirmatively that the relator had not been absent five days before the day of trial. Thus it was conclusively established that the second ground upon which the commissioners sought to justify the dismissal of the relator had no existence in fact, and that his dismissal was wholly unauthorized. With the record showing affirmatively that the relator was improperly dismissed because there was no proof of the charges against him, and that he had not ceased to be a member of the force by reason of five days' absence without leave before the day of trial, the

learned appellate division dismissed the writ and affirmed the proceedings of the commissioners, with $50 cost and disbursements to them. If correctly understood, the only ground upon which the respondents attempt to sustain the order of the appellate division is that there was no allegation in the petition attacking the validity of the respondents' claim that the relator had ceased to be a member of the force under the provisions of the statute relating to an absence without leave for five consecutive days before the day of his trial. It is impossible to understand how the relator could have alleged in his petition the invalidity of a claim not made until nearly two years after the petition was filed, and which had no connection, actual or pretended, with the act charged, and for which the relator was dismissed from the force. It is difficult to believe that such a proposition is seriously submitted. But, be that as it may, it is totally without substance, and does not merit further consideration. It follows that the order of the appellate division should be reversed, and the determination of the police commissioners dismissing the relator annulled and set aside, with costs to the appellant in all the courts.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, LANDON, and CULLEN, JJ., concur.

Order reversed, etc.

Bourbon Stock-Yards Co. *v.* City of Louisville et al.

(Court of Appeals of Kentucky, May 28, 1901.)

[63 S. W. Rep. 285.]

Powers of Attorney Employed to Assist City Attorney.—An attorney employed by the mayor of a city of the first class, with the approval of the members of the board of public works, to assist the city attorney in defending an action against the city and the members of the board of public works, and who also represented other persons interested in the litigation, but not parties to the action, is authorized, on appeal from a judgment in favor of defendants, to make a motion to affirm as a delay case, as he is still acting as attorney with the approval of those who employed him.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the Bourbon Stock-Yards Company against the city of Louisville and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles A. Gibson and Gibson, Marshall & Gibson, for appellant.

R. W. Woolley, for appellees.

PAYNTER, C. J. It appears that Col. R. W. Woolley represented the appellees, city of Louisville and Charles F. Granger, Thomas L. Jefferson, and Thomas B. Saterwhite, members of the board of public works, defendants in the court below. The services which he rendered were in connection with Henry L. Stone, who was and is city attorney, and with

his approval. He not only represented the city, but some property owners who were interested in the litigation, but not parties to the action. He was employed by the mayor with the approbation of the members of the board of public works. He is still acting with the approval of those who employed him, and never has been dismissed as an attorney in the action. We are of the opinion that he was authorized to make the motion to affirm this as a delay case. An examination of the record has convinced us that the motion should be sustained, and the judgment is accordingly affirmed.

Vanneman *v.* Pusey.

(Court of Appeals of Maryland, June 14, 1901.)

[49 Atl. Rep. 659.]

Mayor—Eligibility.—The assessment of city real estate of a value greater than $2,000 to a partnership composed of two persons, by which it is owned in common, is a sufficient assessment against a member of the partnership to prevent him from being ineligible for the office of mayor, under Pub. Loc. Laws, art. 13, § 142, as amended by Act 1890, c. 180, rendering a person not assessed for city real estate in the sum of $1,000 ineligible for mayor.

Appeal from circuit court, Hartford county; James D. Waters, Judge.

Mandamus by Robert K. Vanneman against Clarence C. Pusey to try title to the office of mayor of Haver de Grace. From an order dismissing the petition, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

George L. Van Bibber, S. A. Williams, Thos. H. Robinson, and P. L. Hopper, for appellant.

O. T. Rogers, Richard Dallam, and Edwin G. Baetjer, for appellee.

FOWLER, J. In our opinion, the construction suggested by the plaintiff is too narrow. If it should be adopted, it would follow that, if the defendant, Pusey, were alone doing business in the name of Pusey & Co., and owned the whole of the real estate assessed in the name of Pusey & Co., he would not be qualified, because, although he, and he alone, would be liable for the taxes, the assessment is made in his business or firm name. We think the assessment relied on by the defendant gratifies the provisions of the charter, and the order appealed from dismissing the petition should be affirmed. Order affirmed, with costs.

Chapman *v.* City of New York.

(Court of Appeals of New York, Oct. 1, 1901.)

[61 N. E. Rep. 108.]

Municipal Officers—Prosecution for Official Misconduct—Expenses of Defense Not to Be Borne by City—Unconstitutional Statute.—Laws 1899, c. 700, provides for the appointment of a referee to examine into and report the amount of reasonable counsel fees and expenses of a city or county officer in defending successfully in any trial to remove him from office or convict him of crime alleged to have been committed in connection with his official duties, the amount to be paid by the issue of revenue bonds by the city or county affected: *held*, that such act, so far as it attempts to create an indebtedness against a city or county for expenses incurred by a police officer in defending charges against him for official misconduct, would constitute the application of money to an individual, and not to a city or county purpose, in violation of Const. art. 8, § 10, prohibiting a county or city from incurring any indebtedness except for a county or city purpose.

Appeal from supreme court, appellate division, First department.

In the matter of the application of George S. Chapman for the payment of a claim against the city of New York. From a judgment of the appellate division (68 N. Y. Supp. 1135) affirming an order of the special term denying a motion for the appointment of a referee to hear and examine into the claim, the claimant appeals. Affirmed.

William F. S. Hart, for appellant.

John Whalen, Corp. Counsel (Theodore Connoly, of counsel), for respondent.

VANN, J. The statute under which this proceeding was instituted provides for the appointment of a referee "to hear, examine into, and report," the amount of reasonable counsel fees and expenses paid or incurred by a city or county officer in successfully defending himself in any trial or proceeding "to remove him from office or * * * to convict him of any crime" alleged to have been committed "in the performance of or in connection with his official duties," and that the amount allowed by the referee, when confirmed by the court, be paid by the issue of revenue bonds, to be included in the taxes levied for the following year in the city or county affected. Laws 1899, c. 700. Another part of the act provides for the payment of similar claims by the state, but, as the validity of that part is not involved in this appeal, no further allusion need be made to it. While other questions have been discussed before us, the main question is whether the legislature had power, under the constitution of our state, to pass this statute. That question has been passed upon several times by the supreme court, and the conclusion reached by every judge who considered it is that the statute is unconstitutional. In re Straus, 44 App. Div. 425, 61 N. Y. Supp. 37; In re Jensen, 28 Misc. Rep. 379, 59 N. Y. Sup. 653, affirmed in 44 App. Div. 509, 60 N. Y. Supp. 933; Chapman v. City of New York, 57 App. Div. 583, 68 N. Y. Supp. 1135; In re Fallon,

28 Misc. Rep. 748, 59 N. Y. Supp. 849; In re Labrake, 29 Misc. Rep. 87, 60 N. Y. Supp. 989. Our examination has led us to the same result, and, as the discussion of the subject has been so thorough and able in the courts below, it is necessary for us to do little more than announce our conclusion.

PARKER, C. J., and BARTLETT, HAIGHT, LANDON, CULLEN, and WERNER, JJ., concur.

Order affirmed.

Fresno Canal & Irrigation Co. *v.* McKenzie et al.

(Supreme Court of California, June 15, 1901.)

[65 Pac. Rep. 473.]

Claim against City—Payment by City Treasurer under Decree of Court.—Where a decree of a court having jurisdiction directed a city treasurer to pay a certain claim against the city, such decree was a complete defense to an action to charge him with official misconduct in having paid the claim.

Judgment against City—Refusal of Trustees to Issue Warrant—Payment by Treasurer.—Where judgment had been rendered for plaintiff in an action against a city treasurer and board of trustees to compel payment of a claim against the city, such judgment was sufficient to justify the treasurer in paying the claim, though the trustees refused to approve it, or issue a warrant thereon.

Same—Same—Same—Admission of Judgment in Evidence.—Where a city treasurer, acting under a judgment, paid a claim against the city, such judgment was admissible in evidence as justification in an action charging him with official misconduct in having paid the claim.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by the Fresno Canal & Irrigation Company against W. H. McKenzie and another. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Frank H. Short, for appellant.

E. D. Edwards and W. C. Graves, for respondents.

McFARLAND, J. The judgment appealed from is right. Where there are several holders of claims against a municipal corporation, each claim being payable only out of the municipal revenues of a certain year, and those revenues being insufficient to satisfy all the claims, no doubt, under our law on the subject as it now stands, creditors may be somewhat embarrassed, as was noted in Weaver v. City and County of San Francisco, 111 Cal. 319, 43 Pac. 972; but in the case at bar the question is whether or not McKenzie, as treasurer, was guilty of such official misconduct or malfeasance as made him liable to plaintiff in damages. The general rule undoubtedly is that the mandate of a court having jurisdiction in the premises protects the officer who obeys it, and we see nothing in the case at bar which takes it out of that rule. The force of the judgment is sought to be lessened by the suggestion that it refers only to moneys in the sewer fund "not otherwise appropriated"; but, even if that expression can be

construed as qualifying all preceding clauses, and as embracing "any money now in his hands," still there is no ground for contending that the money decreed in the judgment to be paid by the treasurer to McBean had been theretofore "otherwise appropriated." There is nothing in the proposition that, although the trustees and the treasurer had defended the action brought by McBean, and judgment had been rendered in his favor, still such judgment was worthless unless the trustees should afterwards "approve" it, and order a warrant to issue for its payment. All the opposition which the defendants in that action could make to McBean's demand was ended by the judgment, which was a judicial adjudication that the treasurer should pay that demand. The final arbiter was the court, not the trustees. Indeed, the ordinance itself, which provides for the auditing of demands and their payment on warrants, contains the clause, "except as otherwise by law provided." The contention of appellant that the court erred in allowing the introduction in evidence of the judgment roll in the McBean case is, of course, under the above views, not maintainable. It could not have been rightfully excluded on the ground that appellant was not a party to that action. The respondent had the right to introduce the judgment under which he justified his action, and the question is whether he was guilty of official misconduct in obeying it. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

City of Iron Mountain *v.* Uddenberg, City Treasurer.

(*Supreme Court of Michigan, June 17, 1901.*)

[86 N. W. Rep. 434.]

City Treasurer—Salary.—The statute governing the organization of the relator provides that the city treasurer shall receive such annual salary as the council shall determine by ordinance. The council passed an ordinance fixing a salary, and providing that it should be in full compensation for all services rendered the city by him. The statute imposes the duty upon the city treasurer to collect all taxes, state, county, and municipal: *held*, that the salary included all the compensation to which the treasurer was entitled, and that the collection fees belong to the city.

Certiorari to circuit court, Dickinson county; John W. Stone, Judge.

Application by the city of Iron Mountain for a writ of mandamus against Arthur Uddenberg. From an order granting the writ, defendant brings certiorari. Affirmed.

The relator is a city of the fourth class, organized under section 3060, c. 88, 1 Comp. Laws (being section 38 of chapter 7 of the act), provides for the compensation of city officers, and that the treasurer, among other city officers, "shall receive such annual salary as the council shall determine by ordinance." The relator passed an ordinance in which the salary of the city treasurer was fixed at $750, and provided that it

should be in full compensation for all services rendered the city by him. Section 3034 requires the treasurer to make an annual report to the common council of the receipts and disbursements of the treasurer during the previous year. The respondent, the city treasurer, did not account for $552.02, being collection fees on taxes paid subsequent to January 9, 1901. His contention is that the collection of taxes is not a part of his duty as city treasurer, and that the collection fees belonged to him, and not to the city. The relator filed a petition in the circuit court for the writ of mandamus to test the question. The learned circuit judge held that the moneys belong to the city, and granted the writ. The case is before us for review by the writ of certiorari.

Brown & Trudell, for appellant.

H. M. Pelham, for relator.

GRANT, J. (after stating the facts). Section 3033, Comp. Laws, provides, among other things, that "the city treasurer shall be the collector of state and county taxes within the city, and all other taxes and assessments levied within the city; he shall perform all such duties in relation to the collection of taxes as the common council may prescribe, and as provided by this act." Section 3335 provides that he "shall perform the same duties and have the same powers as township treasurers, except as herein otherwise provided." Section 3310 provides that moneys not received or appropriated for any particular fund shall be credited to the contingent fund. Section 3332, as originally enacted, provided that "all such percentages for fees collected by him [city treasurer] shall be paid into the city treasury to the credit of the contingent fund." This section was amended in 1899 (Pub. Acts 1899, p. 204), and that clause was omitted. It seems to us entirely clear that it was the purpose of this act to impose upon the treasurer as such the duty of collecting taxes, and not as the independent agent of the state, and to confer upon the municipality the power to fix his compensation for all such services. This duty was imposed upon him as a city officer with the provision that he should receive for all his services such compensation as the common council might by ordinance allow. The ordinance enacted covers his compensation for all services he renders as such officer. The provision that, as collector, he should have the same power as township treasurers, relates solely to the methods provided for collecting the taxes, and does not carry with it the right to retain the fees in addition to his salary. Township treasurers receive no other compensation than the fees provided by law. The fact that in the amendment of 1899 the closing sentence of section 3332 was omitted is not of itself sufficient to show that the legislature intended to increase the treasurer's compensation beyond that fixed by the council. Without the omitted clause, all such fees would, under section 3310, be credited to the contingent fund. Judgment affirmed. The other justices concurred.

Miller *v.* Haskell et al.

(*Supreme Judicial Court of Massachusetts, Suffolk, June 18, 1901.*)

[60 N. E. Rep. 982.]

Claim against City—Attorney Employed to Settle Not a Broker.—Where plaintiff was employed to settle a claim against a city, for which he was to receive a certain percentage of the amount obtained, he was not a broker, so as not to be entitled to recover for his services unless they were successful.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Action by George R. Miller against Alfred T. Haskell and others. From a judgment in favor of defendants, plaintiff brings exceptions. Sustained.

Berry & Upton, for plaintiff.

Anson M. Lyman, for defendants.

LORING, J. The defendants contend that the plaintiff was not entitled to be paid for his services, because a broker who is not successful is not entitled to any compensation. It is true that in this case the plaintiff, by his own testimony, was to receive a commission of a specified amount if he was successful in settling the case on terms satisfactory to the defendants. But that commission was not a brokerage commission. The plaintiff was not a broker, and was not employed as a broker. He was a business man, and he was employed to perform services ordinarily performed by a lawyer, namely, to obtain compensation for property taken by the city of Boston under the right of eminent domain. The stipulation that he was to receive a commission of 5 per cent. on the amount received by the defendants in case he was successful in obtaining a settlement of the claim satisfactory to them was merely a stipulation fixing the compensation which he was to receive for his services in that contingency, leaving the compensation to be received by him, if he was not successful, to be determined by the value of the services rendered. Exceptions sustained. New trial granted.

State (Potts et al., Prosecutors) *v.* City of Cape May et al.

(*Supreme Court of New Jersey, June 11, 1901.*)

[49 Atl. Rep. 584.]

Municipal Employees—Charter Provisions—Ultra Vires.—The charter of the city of Cape May authorizes the city council to appoint, besides the officers named in the charter, "such other and all subordinate officers of the said city as may, in the opinion of the city council, be necessary for the better ordering and governing the said city, for the preservation of its health, or for the convenience, safety and advantage of commerce and trade." The city charter also provides that "the city council shall have power to make and establish such ordinances, regulations, rules and by-laws * * * as they may deem necessary and proper * * * for the prosperity of the said city and its inhabitants, and the same to alter, modify and repeal": *held*, that neither of these clauses of the city charter

authorizes the appointment by the city council of an officer "to properly represent the city in an advertising or general way * * * as a resort, before the people at large."
(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Charles W. Potts and others, to review two resolutions of the common council of the city of Cape May. Resolutions set aside.

Argued February term, 1901, before GUMMERE and FORT, JJ.

J. Spicer Leaming, for prosecutors.

James M. E. Hildreth, for defendant city of Cape May.

Horace F. Nixon, for defendant Lemuel E. Miller.

FORT, J. We do not think the provisions of the city charter above quoted are broad enough to cover an engagement of a party to perform the services indicated by the resolutions brought up by the writ, and the bill of Mr. Miller as presented to the city council as found in the record. The items of the account rendered by Mr. Miller clearly demonstrate that the duties he did, and which evidently he thought he was engaged to perform, consisted in going to Philadelphia, and entertaining persons there and at Cape May, at dinner, and the like; the dinners being given to persons whom he might think able to "boom" the city, or bring custom to it by way of shortened or speedy transportation. The evidence would seem to indicate that the chief efforts of Mr. Miller were directed to securing advantages for the Cape May & New Jersey Coast Steamship Company, in which he either was then, or very soon after, largely interested, as his testimony shows. The power to appoint city officers, in the ninth section, gives authority to appoint as city officers only such officers as "may be necessary for the convenience, safety, and advantage of commerce and trade." That means commerce and trade within the city; the regulation and direction of commercial affairs within the city; such officials as may be necessary within the city to promote convenience, secure safety, and be to the advantage of commerce and trade of the inhabitants. Nor do we think that the general welfare clause in the twentieth section of the charter, which permits the city to adopt regulations, etc., for the "prosperity of said city and its inhabitants," furnishes authority to engage a man for the purposes for which Mr. Miller was engaged. The twentieth section only authorizes the employment of officials "for the preservation of the public health and prosperity of said city and its inhabitants." This clause cannot be extended to embrace officers as city officials who are to be engaged in matters entirely aside from city duties within the purview of the city government. If it is within the power of a city council under a general welfare clause of this character to appoint and pay an officer to travel, advertise, and canvass for custom and sojourners, it is equally within their power to engage in various enterprises, which they may think will bring advan-

tage by way of commerce or trade to the city. Such powers will never be inferred. If they are found to exist, it must be because of some express provision of the city charter by which they are clearly conferred. The resolutions brought up are ultra vires the municipality, and are set aside.

State ex rel. Ward, Atty. Gen., *v.* Churchman.
(*Superior Court of Delaware, Newcastle, March 27, 1901.*)
[49 Atl. Rep. 381.]

Judge of Municipal Court—Appointment by Governor—Ratification by Senate.—The municipal court for the city of Wilmington, under 17 Laws Del. c. 207, § 14 et seq., creating it, and defining its jurisdiction, being an "inferior court," within the meaning of Const. art. 4, § 30, the judge of such court is a public "officer," within Id. art. 3, § 9, so that his appointment by the governor must be confirmed by the senate in order to be valid.

Quo warranto by the state of Delaware, on the relation of Herbert H. Ward, attorney general, against Phillip Q. Churchman. Judgment for defendant.

Robert G. Harman and J. Harvey Whiteman, for plaintiff.
Walter H. Hayes and Herbert H. Ward, for defendant.

BOYCE, J. The special powers and jurisdiction intrusted to the said municipal court by the general assembly, under the said provision of the constitution already mentioned, relate exclusively to infractions of certain criminal laws of the state within the corporate limits of the city of Wilmington, the enforcement of which laws, in the absence of such an inferior court, or any other court authorized by the constitution, is vested in the court of general sessions,—a state court. It seems to us, therefore, from what we have said, the conclusion that the said municipal court is something more than a mere corporate agency is irresistible. While performing certain corporate duties, it is true, yet it is clothed with higher and more important public duties. It is stamped with a greater dignity, and is of more public importance, than that of a mere corporate court or agency. And, by the specific grant of jurisdiction conferred upon it under constitutional authority, it follows, we think, that said court, in the administration of the criminal laws of the state, confided to it, although circumscribed within well-defined territorial limits, is a public or state agency. And its judge, charged with duties, it may be said dual in their character,—public and corporate,—is a public officer, to the extent, at least, of the enumerated powers and duties imposed upon him by the legislature, pursuant to said provision in the constitution. He is a judge of an inferior court, established by the general assembly under said section of the late constitution, which, with some additions thereto, was incorpoated in the present constitution; and as a judge of such inferior court he is an "officer," within the meaning

and purpose of section 9, art. 3, of the present constitution (the salary, fees, and emoluments of his office exceeding the sum of $500 annually), whose appointment must be confirmed by the senate, as provided by the said last-mentioned section.

White *v.* City of San Antonio.

(*Supreme Court of Texas, Jan. 24, 1901.*)

[60 S. W. Rep. 426.]

Health Officers—City Not Liable for Negligence of in Enforcing Quarantine Regulations.—Under Rev. St. arts. 4328, 4330, which make health officers of a city officers of the state, and hence vest them with functions of interest to the public at large, a city is not liable in damages for the negligence or misconduct of such officers in enforcing quarantine regulations.

Error from court of civil appeals of Fourth supreme judicial district.

Action by George M. White against the city of San Antonio. From a judgment of the court of civil appeals (57 S. W. 858) reversing a judgment for plaintiff, he brings error. Judgment for defendant.

C. A. Keller, Mason Williams, and Denman, Franklin, Cobbs & McGown, for plaintiff in error.

Geo. C. Altgelt, for defendant in error.

GAINES, C. J. This suit was brought by the plaintiff in error to recover of the city of San Antonio for the acts of its mayor and health officer in taking possession of the plaintiff's hotel and in placing and detaining therein certain persons suspected of having been exposed to the infection of yellow fever. Upon the trial he obtained a verdict and judgment in his favor, from which the city appealed. The court of civil appeals reversed the judgment, and remanded the cause. Thereupon the plaintiff applied for and obtained a writ of error to the judgment of the appellate court upon the ground that its decision practically settled the case. The plaintiff was engaged in the business of keeping a hotel in the city of San Antonio. A theatrical company appeared in the city, having come from New Orleans, where the yellow fever was then supposed to prevail. The persons composing the troupe were taken in charge by the police of the city, acting under the orders of its mayor and health officer, and were placed in apartments at the plaintiff's hotel, and there confined for six days. In consequence of this action the plaintiff's business was damaged, as found by the jury. * * *

The enforcement of quarantine regulations and the establishment and maintenance of pest houses are matters of vital interest to the public in general, and are peculiarly a public function, and therefore, when devolved upon a city, are most generally held to belong to that class of duties for which a city is not answerable, when, through the negligence or misconduct of its officers in their performance, damages are inflicted. The rule is recognized by our leading text writers,

and is maintained by courts of the highest authority. Jones, Neg. Mun. Corp. § 30; 2 Dill. Mun. Corp. § 977; 1 Shear. & R. Neg. § 266; 2 Thomp. Neg. 737; Tied. Mun. Corp. § 332; Cooley, Torts (2d Ed.) pp. 740, 741, and note; Maxmilian v. Mayor, etc., 62 N. Y. 160; Lynde v. Rockland, 66 Me. 309; Spring v. Inhabitants of Hyde Park, 137 Mass. 554; Boome v. City of Utica, 2 Barb. 104; Webb v. Board (Mich.) 74 N. W. 734; Gilboy v. City of Detroit, 115 Mich. 121, 73 N. W. 128; Ogg v. City of Lansing, 35 Iowa, 495; Bryant v. City of St. Paul (Minn.) 23 N. W. 220. To these citations many others might be added in which the question is presented in various aspects. The statutes of this state provide that "all county and municipal quarantine shall be subordinate, subject to and regulated by such rules and regulations as may be prescribed by the governor or state health officer" (Rev. St. art. 4328); and also that "all health authorities of the state, or of any county or city thereof, shall obey the rules and regulations prescribed by the governor or state health officer" (Rev. St. art. 4330). These provisions make the health officers of a city officers of the state, and show that in our state their functions are governmental, and are conferred in the interest of the public at large. In Clayton v. City of Henderson, 44 S. W. 667, 57 S. W. 1, the court of appeals of Kentucky hold in opposition to the opinion which we have expressed. The case relied upon to sustain their ruling is Haag v. Board, 60 Ind. 511. That was an action against a county for wrongfully maintaining a pest house near the dwelling of the plaintiff, and to abate the nuisance. It was held that a demurrer to the petition was wrongfully sustained. It is not quite clear that the court intended to hold that an action for damages would lie against a public corporation in such a case. That an action may be maintained to abate by injunction a nuisance of the character of that in question we have no doubt. Whether it can be sustained against a municipal corporation as well as against the officers who have created it may be a question of some difficulty. But, if the court in that case intended to hold that an action for damages could, at common law, be maintained against a county, we do not concur. With due deference, we think the authorities cited in the opinion do not sustain that position. There is, to say the least, a controlling weight of authority in favor of the opposite view. The contrary seems to be held by the same court in the case of Summers v. Daviess Co., 103 Ind. 263, 2 N. E. 725, and in other cases cited in the opinion in that case. Since we concur with the court of civil appeals in holding that an action did not lie against the city for the wrongs complained of in the petition, and since the case has been brought here on the ground that the decision of that court practically settles the case, it becomes our duty, under the statute, not only to affirm the judgment of that court, but to render judgment here for the defendant in error. It is accordingly so ordered.

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Ott *v.* State ex rel. Lowrey.

(Supreme Court of Mississippi, Feb. 4, 1901.)

[29 So. Rep. 520.]

Officers Elected by Vote of Council—Right of Mayor to Vote.—Where city aldermen hold an election for a tax collector, required by Code, § 2992, to be elected by the mayor and aldermen, and five aldermen vote for one candidate, and four for another, the mayor cannot cast his vote for the minority candidate, and then cast a deciding vote to elect such candidate, since the mayor is not a member of the board of aldermen, and is only entitled to vote when there is a tie.

Same—Invalidity of Election Held by Retiring Council.—Code, § 2989, provides that the regular meeting of the board of aldermen of a city shall be on the first Tuesday of each month. Section 3030 provides that the general municipal election shall be held on the second Tuesday of December of each year, and the term of the officers so elected shall commence on the first Monday of the succeeding January. Section 2992 requires the board of aldermen to elect a tax collector at the first meeting after the annual election. A new board of aldermen was elected in December, but the 1st day of January came on Tuesday, and the old board met and elected a tax collector. On the first Monday of January, which was on the 7th day of the month, the new board qualified and elected a collector: *held*, that the election by the new board was valid, since the statute contemplated that the election should be by the new board, though it was not in existence on the first regular meeting in January.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

Quo warranto by the state, on relation of R. J. Lowrey, against John Ott, to try title to an office. From a judgment ousting defendant, he appeals. Affirmed.

On the 11th day of December, 1900, a regular election for city officers was held in the city of Biloxi, at which a mayor and a board of aldermen were elected, whose term of office under the law, began on the first Monday of January, 1901; this being the 7th day of that month. After this election, on the first Tuesday—the first day—of January, 1901, the mayor and board of aldermen then holding met and undertook to elect the officers who are by law required to be elected by the mayor and board of aldermen. At that meeting R. J. Lowrey was elected city tax collector. On the 7th day of January, 1901, the mayor and board of aldermen that had been elected in December before met and proceeded to elect the same officers. At that election five aldermen voted for Lowrey, and four voted for John Ott, for city tax collector. The mayor then voted for Ott, in that way giving each candidate five votes. He then voted again for Ott, as if there had been a tie vote, and declared him elected, and issued a commission to him. He thereupon qualified and entered upon the duties of the office. Thereupon Lowrey filed an information in the nature of a quo warranto, setting up the foregoing facts, and praying for judgment of ouster against Ott. Ott demurred to this petition. The demurrer was overruled, and a judgment of ouster was rendered against him, from which he appealed.

Bowers, Chaffe & McDonald, for appellant.

W. A. White and A. Y. Harper, for appellee.

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WHITFIELD, C. J. In the case of Bousquet v. State (decided last Monday) 29 South. 399, we held that the mayor of a municipality which had accepted the provisions as to municipalities provided by the Code of 1892, in the chapter on that subject, could not vote, in an election for the officers provided for in section 3001 and section 2992, except when there was a tie between the aldermen; that the mayor was not a member of the board of aldermen, and could not vote, as an alderman, to make a tie, and then, as mayor, to break it, thus voting twice. In this case, adhering to that ruling, we are required to decide the further question whether the old board or the new board should elect the tax collector, since section 2992 provides that the tax collector shall hold his office for two years, and until his successor is qualified, and the successful litigant in this case would not, without such decision, know from what date his term of office began. We are satisfied, after a careful and critical examination of the chapter on "Municipalities" in the Code of 1892, that the old board had no power to elect. Such power can only be derived from the most technical adherence to the very letter of sections 2989 and 2992, looked at isolatedly, wholly disconnected from all of the other sections of that chapter relating to the matter. Such construction is manifestly opposed to the whole spirit and scope of said chapter. It would permit a board, which had been defeated at an election on the very issue of who the tax collector should be, to elect, when the first Tuesday of January came before the first Monday, that person tax collector who had been repudiated at the polls, where, as might occur, his selection was made a matter of preference and instruction by the voters. The plain purpose of the Code provisions was that the new board—the incoming administration—should choose the clerk, the tax collector, and the police justice, unembarrassed by any opposition on the part of the retiring board. The new administration is the one with which the new subordinate officers are to work, and is responsible to the people for making a wise selection. An inspection of the calendar shows that beginning with 1892, and concluding with 1929, A. D., a period of 38 years, there are only 5 instances in which the year succeeding a municipal election begins on Tuesday. There will occur in said period 19 city elections, and in only 5 of these does the year following begin with Tuesday. The legislature had in mind the general, not the exceptional,—what would usually happen, to wit, that Tuesday would come after Monday, not what would be extraordinary, and happen only 5 times in 19 elections, or 38 years. Some point was attempted to be made as to the disarrangement of the terms of office—their unequal length—on the construction we favor. But the same thing would apply as an objection in the matter of the term of governor; and, besides, if fixed and permanent procedure is the object to be secured, how is that in any wise accomplished by upsetting 5 times in

19 the regular course of procedure? It has long ago been declared as settled law, universally approved and followed, that "a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." People v. Utica Ins. Co., 15 Johns. 358–380. This court has furnished some most striking illustrations of construing a statute according to its spirit, when that is clear, against the mere letter. See, notably, Railroad Co. v. Trotter, 60 Miss. 442; Ex parte Gore, 57 Miss. 251; and Bates v. Stokes, 40 Miss. 56. Illustrations from other courts might be indefinitely added. We laid down the true rule of construction in Adams v. Railroad Co., 75 Miss., at page 285, 22 South. 826, which we reannounce, to wit: "A statute must receive such construction as will, if possible, make all its parts harmonize with each other, and render them consistent with its scope and object. The entire statute must be so read that the whole may have a harmonious and consistent operation. In the construction of a statute, the object is to get at its spirit and meaning,—its design and scope; and that construction will be justified which evidently embraces the meaning and carries out the object of the law, although it is against the letter and the grammatical construction of the act. In determining the proper construction of a statute, the entire legislation on the subject-matter,—its policy, reason, as well as the text,—must be looked to." Again, contemporaneous construction by those whose duty it is to act under and administer a statute is oftentimes materially helpful. This state of affairs existed in 1895, and yet no one ever pretended that the old board could elect; and, so far as the records of this court disclose, the present is the only instance where such contention as appellants make has been advanced. It is also a fundamental rule of construction that courts will not give any statute such construction as would charge upon the legislature folly or absurdity. We can conceive nothing more foreign to the whole spirit and scope of this municipal legislation, which more directly affronts common sense, or which more inevitably imputes folly to the legislature, than the construction which would authorize a defeated board to fasten upon an incoming administration, and the taxpayers of a city, officers not chosen by that new board, and who might be actually hostile to it, and unacceptable to the people who elected the new board. We know, of course, nothing about the officers here contending, and are speaking by way of argument, merely, to show how untenable is appellant's contention. In construing a statute, how it may operate, and not simply how in a single instance it does operate, is to be considered. The ordinary operation, not the isolated instance, is material. All the sections relating to the organization of the new mayor and board of aldermen, and the election of

their subordinate officers, should be looked at as one whole, and collocated so as to make the purpose of the legislature effective. If sections 2989, 2992, 3001, and 3030 be properly collocated, and looked at as one entire scheme, it is perfectly clear that the new board alone has the power. Section 2989 simply provides that the regular meetings of the board shall be on the first Tuesday of each month, not that these officers shall be then elected. These sections should be collocated in the following order: Sections 3030, 2992, 3001. Section 3030 provides for the election and organization of the new board. Section 2992, which should be read immediately after it, then provides that "at the first regular meeting of the mayor and board of aldermen succeeding each regular election they shall elect," etc.; manifestly meaning "at the first regular meeting of the new mayor and board of aldermen,"—the one just elected and organized as provided in section 3030. No other sensible construction can be given to the two sections thus collocated, and none other would probably occur to any mind were they so collocated. It is perfectly permissible so to transpose and collocate them. Section 2992 manifestly refers to the board provided for by section 3030,—the new board. Indeed, such transposition and collocation go far to place the power of the new board to elect within the letter as well as the spirit of the law, since section 2889 is merely a general direction as to when regular monthly meetings shall be held for any and all purposes every month, not having any special reference to the election provided for in section 2992. Counsel for appellee have yoked the wrong sections together (sections 2889 and 2992), and, like Nelson at Copenhagen, shut their eyes on section 3030, and so have not seen the plain meaning of the law, to be seen at a glance by yoking sections 3030 and 2992 together, and reading them in this order.

We have given the case most careful consideration, as its importance demanded should be done, and are clearly of the opinion that the new board alone has the power to elect the officers named in section 2992. Relator was elected by the new board, and his term of office dates from that election. The views of the learned circuit judge are in conformity with these views, and the judgment is affirmed.

Bousquet *v.* State ex rel. Gleason.

(Supreme Court of Mississippi, Jan. 28, 1901.)

[29 So. Rep. 399.]

Mayor's Right to Vote in Council.—Code, § 3001, authorizes "the mayor and board of aldermen" of cities of a certain size to elect a police justice; and section 2979 prescribes that the mayor shall preside at all meetings of the board of aldermen, and, "in case there be an equal division," shall give the deciding vote: *held*, that a mayor could not vote for the election of officers by the council, except in the

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case of a tie vote in the council, and an election of a police justice wherein the mayor voted to make a tie, and then voted again to decide the tie thus made, was illegal.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

Quo warranto by the state, on relation of T. H. Gleason, against J. A. Bousquet, to determine the legality of an election of a police justice. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The mayor and board of aldermen of the town of Biloxi met in January, 1901, and proceeded to elect a police justice for the town. There were two candidates for the office,—J. A. Bousquet and T. H. Gleason. Five aldermen voted for Gleason, and four voted for Bousquet, and the mayor also voted for Bousquet, thus giving each candidate five votes. The mayor then voted again for Bousquet, as if there had been a tie vote, and declared him elected, and issued a commission to him, and he qualified and entered upon the duties of the office. Thereupon Gleason filed an information in the nature of a quo warranto, setting up the foregoing facts, and praying judgment of ouster against Bousquet. Defendant demurred to the petition, and the demurrer was overruled and a judgment of ouster was rendered against him, and from that judgment he appealed.

Bowers, Chaffe & McDonald and McWillie, Thompson & V. A. Griffith, for appellant.

White & Harper and Monroe McClurg, Atty. Gen., for appellee.

WHITFIELD, C. J. It is not necessary to decide in this case anything more than the right of the mayor to vote twice, and to vote in the election of officers. We are clearly of the opinion, after a careful anaylsis of the statutes bearing on the question, that the mayor of a city which has come under the provisions of the Code of 1892 on municipalities can only vote on an election for officers provided for by section 2978 when there is a tie between the aldermen. He is not a member of the board of aldermen. Counsel well say: "It is clear from an examination of chapter 93 of the Code that the mayor is not, and was never intended to be, a member of the board of aldermen. He is not elected from the aldermen. and is not made a member by the statute. The affairs of the city are administered by the 'mayor and board of aldermen.' The mayor sits with, but is not a constituent part of, the board of aldermen. He has only such powers in joint meetings of the mayor and board of aldermen as are given him by the statute. Section 2979 of the Code prescribes his duties and defines his powers at such meetings, which are (1) to preside at all meetings of the 'board of aldermen'; (2) in case there be an equal division, to cast the deciding vote; (3) to veto any measure passed by the 'board of aldermen.' It is manifest from this section alone

that he is not a member of the board. He is referred to as presiding over meetings of the 'board of aldermen,' and voting in case of an equal division (from the context, manifestly meaning an equal division of the aldermen), and vetoing measures passed by the 'board of aldermen,' not passed by the 'mayor and board of aldermen.' By section 2979 it is also provided that a measure vetoed can be passed by a two-thirds vote of the 'aldermen' (not the 'mayor and aldermen'); meaning, unquestionably, a two-thirds vote of all those present entitled to vote. If all the aldermen were present when a measure was vetoed, would any one contend that, if six aldermen voted to pass such measure over the mayor's veto, by voting with the three he could defeat the measure? By section 2986 the mayor has the right to remit fines, etc., by and with the consent of the aldermen; meaning, of course, as shown by a majority vote. Will it be contended that in a body of nine aldermen the mayor could take four, and by voting twice make a vote of six to five, and thereby be enabled to remit fines by the consent of a minority of the aldermen voting? By section 2991 a majority of all the aldermen elected constitute a quorum to do business, and section 2943 authorizes the selection of an alderman to preside in the mayor's absence; so five aldermen could meet and transact business, but four aldermen and the mayor could not. If the mayor and four aldermen had absented themselves from the meeting at which this election was held, the five remaining aldermen could have proceeded to hold the election and to transact business; but, if these five aldermen had absented themselves, the remaining four, with the mayor, would have been powerless either to proceed with the election or transact other business. If four aldermen and the mayor have six votes, why do they not constitute the quorum to do business, when five aldermen, with five votes, constitute a quorum? Nor is the board even designated as the 'board of mayor and aldermen,' but the statute invariably uses the expression 'mayor and board of aldermen.' Thus by section 2925 the 'mayor and board of aldermen' are authorized to pass ordinances; by section 3005, the 'mayor and board of aldermen' may provide a municipal building; by section 3014, the 'mayor and board of aldermen' may issue bonds; by section 2992, the 'mayor and board of aldermen' may elect a tax collector; and by section 3001, a police justice; and so on,—indicating clearly that it was never the intention of the legislature that the mayor and aldermen should form a board or electoral college, of which the mayor and the aldermen should all be members. * * * If section 2978, which says these officers shall be elected by the 'mayor and board of aldermen,' thereby gives the mayor a vote in the election of officers when there is no tie, then all the other sections of the Code providing for the transaction of business, when the same language is used, would give him, as a matter of course, the same right; thereby vesting the mayor with the

power to vote in passing measures, and then veto them, and vote again in sustaining his veto. By section 2978 the number of aldermen in a village is fixed at three. Suppose the court should hold that the mayor has a vote in the first instance, and then another in case of a tie; then in all cases it would require a unanimous vote, and not a two-thirds vote, of the aldermen in a village to pass any measure without the assent of the mayor; for if the vote of the aldermen should be divided, one voting for and two against the measure, the mayor, by voting with the one, can make a tie, and then vote again and carry it, although two-thirds of the aldermen vote against the measure, or he could defeat a measure in the same way, although two-thirds of the aldermen should vote for it." We think these are sound views. The monstrous proposition that the mayor can vote in such election for officers, as an alderman, to create a tie, and then, in his capacity as mayor, to break the tie,—a construction which leads to the most absurd results,—cannot be attributed to the legislature. No such construction is warranted. Section 2979 completely negatives it. Since the relator was elected, therefore, by the new board, a majority of the aldermen having voted for him, and since, under section 3001, Code 1892, the mayor and board of aldermen could elect a police justice at any time, he is clearly entitled to the office. Wherefore the judgment of the court below is affirmed.

Larson *v.* City of St. Paul.

(*Supreme Court of Minnesota, June 14, 1901.*)

[86 N. W. Rep. 459.]

City Police—Qualifications—Charter Provisions.—Under the provisions of the charter of the city of St. Paul (section 12, c. 48, Sp. Laws 1887) it is not necessary that an appointee to the office of sergeant of police shall possess the requirements therein mentioned for a "policeman, patrolman, or other police officer."

Same—Appointment by Mayor—Consent of Council—Acquiescence.—In order to consent to and concur in an appointment made by the mayor of a police sergeant, the city council need not express its consent or concurrence in any particular way or form. In the case at bar the plaintiff was appointed by the mayor, and entered upon and discharged the duties of the office, and his name appeared as sergeant on the monthly pay rolls submitted to and approved by the city council for more than 7 years, and through its approval of these pay rolls payment was made to him for 84 months as such sergeant: *held*, that by these acts the consent of the council to the appointment was clearly shown.

Same—Removal by Mayor—Findings of Lower Court.—*Held*, further, that the court below was justified in finding that the plaintiff had not acquiesced or consented to an attempted removal by the mayor, but, on the contrary, had always asserted and maintained his right to the office in question, and to the emoluments thereof.

Same—Same—Reinstatement—Salary.—The salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise, nor to the usurpation or colorable possession of it. On the conditions shown here, there is no merit in the claim that the plaintiff cannot recover because there was a de facto officer to whom

the salary was paid during the period of time—about three months—between the day of his attempted dismissal and the day of his reinstatement.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Charles E. Otis, Judge.

Action by Olaf Larson against the city of St. Paul. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

James E. Markham and Arthur J. Stobbart, for appellant.

Oscar Hallam, for respondent.

Pryor *v.* City of Rochester.

(Court of Appeals of New York, April 23, 1901.)

[60 N. E. Rep. 252.]

City Officers—Salaries—Deputy Comptroller—Statute.—Under Laws 1898, c. 182, § 98, relating to cities of the second class, and conferring on the board of estimate and apportionment of such a city authority to fix the salary of all the city's officers except as otherwise provided, which salary shall not be changed during their terms, the power to fix the salary of the deputy comptroller appointed by the comptroller is absolute, and no authority to reduce such salary is conferred on the city council by section 96, requiring the board to submit to the council an estimate of sums necessary to conduct the business of the city, and authorizing the council, after a hearing thereon, to adopt or reject any item therein, such power not including those items which are fixed by or under positive provisions of the statute.

Vann, O'Brien, and Landon, JJ., dissenting.

Appeal from supreme court, appellate division, Fourth department.

Action by Henry H. Pryor against the city of Rochester. From a judgment of the appellate division (68 N. Y. Supp. 86, 57 App. Div. 486), entered on submission of a controversy, plaintiff appeals. Modified.

John Desmond, for appellant.

James Breck Perkins, for respondent.

MARTIN, J. Although we are clearly of the opinion that the authority to fix the compensation of officers and employees of a city of the second class is, by the act of 1898, vested in the board of estimate and apportionment, yet it by no means follows that the common council can in no way regulate or control the amount to be appropriated to the support and maintenance of the city government and the conduct of its affairs. As the legislative branch of the municipal government, it has the power to legislate as to all matters relating to its affairs, except so far as it is restricted by the statute under consideration or other statutes of the state. Among other legislative powers, it has authority to abolish offices of the city in the interest of economy, or for other proper reasons (People v. Ham, 166 N. Y. —, 60 N. E. 191), and in many ways to reduce and control the expenditures of the municipality, as will be readily seen by reference to section 12. No appropriation of money to be raised by a tax can be

made without the action of the common council. It may, therefore, by refusing to appropriate the amount called for by the board, limit the expenditures of any office or department to the amount appropriated, and thus lessen the expenses of the city government. This, however, is not an absolute right, except as to matters which are not established or controlled by statute. So far as a statute established a positive right, it must be regarded as a modification of section 96, withdrawing from the council the legal right to refuse to appropriate the money necessary to pay such claim. While we think the statute under consideration shows plainly that the legislature intended to confer upon the board the power to unalterably fix the compensation of its officers and employees, yet it intended to confer upon the common council power to refuse to appropriate the full amount recommended by the board for each department or office of the city, if it regarded it extravagant, or more than necessary for that purpose. It might reduce the appropriation to an amount only sufficient to pay the charges fixed and established against the municipality by law, in which case it would be the duty of the officer or department to which the appropriation was made to devote the money thus appropriated to those purposes, and no other. If the appropriation was less than the charges which were fixed by statute, it would doubtless be the duty of the disbursing officer to pay from the funds in his hands, to the exclusion of all other claims, such established liabilities of the municipality until the fund was exhausted, when the right to enforce the claims so fixed would mature, and might be enforced by law. In this case, however, as the record does not show that the funds appropriated to the comptroller's department were insufficient to pay the plaintiff's claim when demanded, he was entitled to recover the full amount of his compensation then due at the rate fixed by the board. The judgment awarded by the learned appellate division should be modified by increasing the amount of the plaintiff's recovery to the sum of $1,283.33, and, as modified, affirmed, without costs to either party.

In re Police Com'rs.

(*Supreme Court of Rhode Island, April 30, 1901.*)

[49 Atl. Rep. 36.]

Police Commissioners—Whether State Officers—Duty of Attorney General to Appear for Them.—The board of police commissioners for the city of Newport, appointed by the governor by and with the consent of the senate, is a state board or commission, within Gen. Laws, c. 17, § 4, providing that the attorney general, whenever requested, shall act as the legal adviser of all state boards, and shall represent such boards in litigation, since the duties of such commissioners are of a general nature, rather than municipal.

Application by William Gregory, governor, for the construction of Gen. Laws, c. 17, § 4, relating to the duties of the attorney general.

Fayette County *v.* Board of Education of City of Lexington.

(Court of Appeals of Kentucky, May 28, 1901.)

[63 S. W. Rep. 477.]

Elections—Liability of County for Expense of Municipal Election.—Under Ky. St. § 1540, providing that "the cost of all elections held in any county shall be allowed by the fiscal court of such county, and paid by the county treasurer, except as otherwise provided by law," and Id. § 1452, providing that "the printing and delivery of the ballots and cards of instruction to voters hereinafter described shall, in municipal elections, be paid for by the several cities respectively," the county is liable for the expenses of municipal elections, including the expenses of registration, except the cost of printing and delivering ballots and cards of instruction to voters.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Agreed case between the board of education of the city of Lexington and Fayette county to determine whether the city or the county is liable for the expenses of a certain election. Judgment for the board of education, and Fayette county appeals. Affirmed.

W. P. Kimball, for appellant.

W. Rogers Clay, for appellee.

PAYNTER, C. J. The question involved is whether the board of education of the city of Lexington or Fayette county should bear the expense of the registration and election held for the purpose of selecting a board of education. It is not for this court to consider the question as to whether the county or city of Lexington should have been required by the legislature to bear this expense. It was within the power of the legislature to provide for the payment of the expense and to place the burden of it where it deemed proper. Section 1540, Ky. St., reads as follows: "The cost of all elections held in any county shall be allowed by the fiscal court of such county, and paid by the county treasurer, except as otherwise provided by law." Section 1452, Ky. St., reads as follows: "The printing and delivery of the ballots and cards of instruction to voters hereinafter described shall, in municipal elections, be paid for by the several cities respectively; and in all other elections the printing of the ballots and cards of instruction for the voters in each county, and the delivery of them to the several voting precincts, shall be paid for by the several counties respectively." If there is any other statute relating to the subject under consideration, we are not aware of it. Section 1540 provides that the fiscal court shall allow the costs of all elections held in any county, except as otherwise provided by law. Section 1452 provides that cities shall pay for the printing and delivery of the ballots and cards of instruction used in municipal elections. Instead of making the cities pay the entire costs of such elections, the payment of only specified costs are required to be paid by them. So, construing the sections together, we conclude that the costs

otherwise provided by law is only the printing and delivery of ballots and cards of instruction in municipal elections; therefore the expense of registration and elections held for the purpose of selecting members of the board of education must be paid by Fayette county. As the court below reached this conclusion, the judgment is affirmed.

State et al. *v.* Mayor, etc., of Blue Ridge.

(Supreme Court of Georgia, May 27, 1901.)

[38 S. E. Rep. 977.]

Acceptance of Local Act—Vote of Electors—Validity of Election.—Where the general assembly passed a local act appertaining to a named municipality, and therein declared that, before such act should become operative, it should be submitted to the qualified voters of the municipality, and that, if the act failed of adoption, the same might, after the expiration of 12 months from the first election, be submitted to another election, a second election, which was actually held more than 12 months after the first, was not void merely because the call fixing its date was made, and notice thereof published, before the 12 months had expired.

Same—Same—Who Are Qualified Voters—How Determined.—Where a municipality is authorized to hold an election on the question of adopting an act for the establishment of public schools, and it has no authority of law for ordering a registration, the test for arriving at the number of qualified voters is that prescribed in section 380 of the Political Code, viz.: "The tally-sheets of the last general election held in said * * * municipality * * * shall be taken as a correct enumeration of the qualified voters thereof." If the votes in favor of adopting the act equal or exceed two-thirds of the number cast at that election, the act becomes operative; otherwise it does not. The general registration law does not apply to municipal corporations. Floyd Co. *v.* State, 38 S. E. 37, 112 Ga. 794, and cases cited.

Same — Same — Unqualified Managers of Election — Effect upon Validity of Election—Stare Decisis.—Although one of the managers at such election may not have been a freeholder, he was a de facto manager, and his disqualification would not, of itself, render the election void, there being no allegation of fraud, or that the election was not fair and free. Collins *v.* Huff, 63 Ga. 207; McCrary, Elect. § 247 et seq.; Paine, Elect. § 377 et seq. (a) As shown by the minutes of this court, though it does not so appear in the official report, the case of Walker *v.* Sanford, 1 S. E. 424, 78 Ga. 165, was decided by but two judges, and therefore it is not binding, and, as to this point, will not be followed.

Same — Same—Place of Holding Election.—While the act in reference to the establishment of a public school system in Blue Ridge required that elections relating to the adoption of such act should be held under the same rules and regulations as those required in elections for mayor and council, and the charter of the municipality required elections for these officers to be held at the court house, yet, as it appears that no court house had been erected in the town and turned over to the county at the time of the election now in question, the same was not invalid, it having been held at a place within the corporate limits where the municipal business was transacted. Pol. Code, § 69; Longworthy *v.* Featherston, 65 Ga. 165.

(Syllabus by the Court.)

Error from superior court, Fannin county; George F. Gober, Judge.

Action by J. M. Slate and others against the mayor, etc.,

of Blue Ridge. From a judgment in favor of defendants, plaintiffs bring error. Affirmed.

Morris & Green and M. J. German, for plaintiffs in error.

Thos. A. Brown, O. R. Dupree, and Smith, Hammond & Smith, for defendants in error.

PER CURIAM. Judgment affirmed.

Cavanaugh et al. *v.* Mayor, etc., Pawtucket.

(Supreme Court of Rhode Island, June 12, 1901.)

[49 Atl. Rep. 494.]

Mandamus to City—Demand and Refusal Necessary—What Amounts to.—Where petitioner's bid for the exclusive right to remove dead animals from a city had been accepted by the board of aldermen, which was ex officio board of health, and on request for the issuance of a license or execution of a contract pursuant to the bid the board of aldermen referred the matter to the corporation counsel for advice as to details, and, on his informing them that the choice between a contract and a license was within their discretion, referred the matter to the board of health, such request by petitioners and delay by the board did not amount to a demand and refusal to carry out the terms of the bid, so as to entitle petitioners to mandamus to compel the board to issue a license or execute a contract.

License for Exclusive Privilege of Removing Dead Animals—Proper Form of Instrument.—Where a city advertised for bids for the exclusive privilege of removing dead animals, etc., through the streets, the proper form of document to be executed to the successful bidder as evidence of such privilege was an exclusive license, and not a contract.

Mandamus, on relation of M. J. Cavanaugh and others, against the mayor and aldermen of Pawtucket. Petition denied.

Hugh J. Carroll, for petitioners.

Edward W. Blodgett, for respondents.

ROGERS, J. We are of the opinion that in the case at bar a demand and refusal were necessary, as the petitioners were particularly, if not solely, interested in the performance of the contract; it being for their benefit, and affecting their pecuniary interests. We draw no conclusive inference that the delay complained of is equivalent to a refusal. On March 20, 1901, the board accepted the petitioners' bid. The latter made no demand of the board, but at the next meeting, on March 27, 1901, the petitioners presented a communication asking the board to make it plain whether a form of permit or license or a contract should be prepared, and whether the payment should be for the full term or yearly. The board very naturally referred the matter to the city solicitor, which officer reported verbally to the board on April 17, 1901, that the full sum of $1,500 should be paid; but instead of giving the board any advice as to the further manner of proceeding, as inquired by the petitioners, and which the board evidently desired, he practically told the board to do as they pleased. Under such circumstances, the board's deferring the matter

over that meeting does not seem to us to signify refusal, and, inasmuch as the board of aldermen was also the board of health, simply referring the communication to themselves in the latter capacity, it relating to a matter pertaining to health, does not afford, in our opinion, a conclusive inference that the board had refused, or would refuse if requested, to execute a contract or license.

We observe that there seems to be some question in the minds of the parties as to whether the form of the document called for under said advertisement shall be a contract or an exclusive license. We deem it not improper to say that we think, in view of the language of the rule of the board of health and of the advertisement founded thereon, the proper form would be an exclusive license, and not a contract. For the reasons above given, there having been no demand and refusal, the petition must be denied.

Flynn et al. *v.* City of Philadelphia.

(*Supreme Court of Pennsylvania, May 27, 1901.*)

[49 Atl. Rep. 249.]

Public Improvements—Contracts—Indemnity—Retention of Portion of Contractor's Compensation.—A contract for the construction of public improvements provided that the contractor should indemnify the city for all damages sustained by any party "by or from the contractor, his agents or servants, in performance of the work," and that the city could retain sufficient money due the contractor to satisfy the claims. The succeeding paragraph in the contract prescribed that the contractor should be responsible "for risks and casualties of every description, for loss or injury to persons or property arising out of the nature of the work," etc.: *held*, that where a claim for damages arose from the nature of the work, and was not due to the negligence of the contractor or his agents or servants, the city could not retain the amount of such claim from the amount due him under the contract.

Appeal from court of common pleas, Philadelphia county.

Action by Patrick H. Flynn and others against the city of Philadelphia to recover money retained by the city under the alleged terms of a contract for public improvements. From a judgment for plaintiffs, defendant appeals. Affirmed.

P. H. Flynn & Co. contracted with the city of Philadelphia to erect retaining walls on the north side of Pennsylvania avenue, between Eighteenth and Nineteenth streets, and bridge abutments at the intersection of these streets, incident to the construction of the Philadelphia & Reading Railway subway on said avenue. The contract provided that the contractors should "be responsible for and pay all loss or damage to either person or property which may in any manner arise in the performance of this contract, or by reason of the construction of the said work, during the progress of the same." In the specifications it was provided: "No. 12. The contractor agrees to indemnify and save harmless the city of Philadelphia and the director of the department of public

works and his assistants from all suits or actions of every name and description brought against them, or either of them, for or on account of use of patented rights, and any damages or injuries received or sustained by any party or parties by or from the contractor, his agents or servants, in performance of the work under this agreement. The contractor further agrees that all or so much of the moneys due to him under this agreement as shall or may be considered necessary by the director of the department of public works shall or may be retained by him until all such suits or claims shall have been settled, and evidence to that effect furnished to his satisfaction. No. 13. The contractor, shall assume all responsibility for risks and casualties of every description, for loss or injury to persons or property arising out of the nature of the work, from the action of the elements, or from any unforeseen or unusual difficulty, and shall be responsible for the entire work until completed and accepted by final payment."

John H. Maurer and Francis L. Wayland, Asst. City Sols., and John L. Kinsey, City Sol., for appellant.

Frank P. Prichard, for appellees.

PER CURIAM. In the original and supplemental reports of the learned referee, and in the opinion filed by the learned judge of the court below, there appears a complete and convincing answer to the city's contention respecting the obligation and the duty of the contractor. It was made clear by the reports and the opinion referred to that the city's resistance to the payment of the claim of the plaintiffs was not warranted by any satisfactory evidence in the case. The judgment entered in favor of the plaintiffs and against the defendant, together with lawful interest thereon from the 1st of November, 1898, to the date of the entry of the judgment, amounted to $11,306.87, less one-half of the fee of the referee, to be paid by the plaintiffs, in accordance with the stipulation of the agreement of reference. We therefore affirm the judgment and dismiss the specifications of error. Judgment affirmed.

Watterson *v.* Mayor, etc., of City of Nashville.

(Supreme Court of Tennessee, Feb. 2, 1901.)

[61 S. W. Rep. 782.]

Building Contract—Recovery for Extra Work—No Action to Be Maintained against City upon Agreement Not in Writing—Charter Requirements.—Nashville City Charter, § 43, provides that orders for alterations in the prosecution of any work can be made only by order of the board of public works, and that the order shall be of no effect until the price to be paid for the same shall have been agreed on in writing, and signed by the contractor, and approved by the board; and that the total cost of the work, with the addition of the price so agreed on, shall not exceed the original estimate. Section 44 declares that no contractor shall be allowed anything for extra work caused by any alteration, unless an order is made and signed as provided in the preceding section. Plaintiff contracted in writing with the board of public works for the construction of a city hall, and was ordered

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to make certain changes not included in the original contract, and notified the board in writing that he would demand extra compensation for such changes: *held*, that no action can be maintained in any form to charge the city for the work so performed, since the defendant's charter expressly prohibited the allowance of anything on a contract which did not conform to the provisions of the charter.

Error to circuit court, Davidson county; J. W. Bonner, Judge.

Action by Thomas Watterson against the mayor and city council of Nashville. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Barthell & Keeble, for plaintiff in error.

Price & McConnico, for defendant in error.

BEARD, J. In Murphy v. City of Louisville, 9 Bush, 191, the court said: "If the alleged contract is made otherwise than as required by ordinance, it is not binding; and, if not obligatory as a contract, the law creates no implied promise to pay." In McDonald v. City of New York, 68 N. Y. 25, the court, speaking through Folger, J., said: "How can it be said that a municipality is liable upon an implied provision when the very statute which contains its corporate life and gives it its powers prescribes the mode of exercising them, and says that it shall not, and hence cannot, become liable save by express promise? Can a promise be implied which the statute of frauds says must be in writing to be valid? How do the cases differ?" And in Zottman v. City of San Francisco, 20 Cal. 96, the court, repudiating the doctrine of liability by implication announced by Cope, J., in Argenti v. City of San Francisco, supra, said, through Field, J.: "The law never implies an agreement against its own restrictions and prohibitions, or, as it is expressed in the New York case (Brady v. Mayor, etc., 16 How. Prac. 432), 'The law never implies an obligation to do that which it forbids the party to agree to do.'" See, also, Stuart v. City of Cambridge, 125 Mass. 102; Boston Electric Co. v. City of Cambridge, 163 Mass. 64, 39 N. E. 787; Dickinson v. City of Poughkeepsie, 75 N. Y. 65; McBrian v. City of Grand Rapids, 56 Mich. 95, 22 N. W. 206; Schumm v. Seymour, 24 N. J. Eq. 143; Addis v. City of Pittsburgh, 85 Pa. 379; Beach, Pub. Corp. 252; 1 Dill. Mun. Corp. § 461; Tied. Mun. Corp. § 164.

We are satisfied the rule thus announced is sound; that statutory requirements, such as are found in the charter provisions in question, are jurisdictional in character, a compliance with which is essential to the integrity of a contract for extra work, and that a contract made in disregard to them is void beyond the power of subsequent ratification. To use the language of Chief Justice Nicholson in City of Memphis v. Memphis Gayoso Gas Co., 9 Heisk. 531, "It may be laid down that when a corporation, or an agent thereof, does an act or makes a promise that is forbidden by its charter, or is not authorized thereby, either expressly or by fair implication, the act or promise is a nullity, and cannot be binding by a

subsequent ratification." The application of this rule will work hardship in particular cases, but this is better than that wise safeguards contrived by the legislature to protect the public against improvidence and fraud should be broken down by the courts. It is not requiring too much that parties dealing with municipal agents should inform themselves of the extent of their authority, as well as of the essentials of a valid contract. In other cases, "ignorantia juris neminem excusat," and there is no reason why it should be otherwise when a party enters into dealings with a public corporation. The judgment of the lower court is affirmed.

Ogden City *v.* Weaver (two cases).

(Circuit Court of Appeals, Eighth Circuit, April 20, 1901.)

[108 Fed. Rep. 564.]

Municipal Contracts—Manner of Execution—Validity.—Where the statutes governing a city do not in terms require a contract to be entered into by ordinance, the city cannot avoid a contract which it recognized as valid and acted under for years on the ground that its execution was authorized only by a resolution of the council.

In Error to the Circuit Court of the United States for the District of Utah.

This action was brought by William Adamson and Stanley L. Conklin, as receivers of the Bear River Irrigation & Ogden Waterworks Company, hereafter termed the "Irrigation Company," against Ogden City, the plaintiff in error, to recover the amount alleged to be due to the receivers from the city for water that had been supplied to it by the irrigation company and by the receivers subsequent to their appointment. William C. Weaver, the defendant in error, was substituted as plaintiff after the suit was instituted; the original receivers first above named having been removed, and said Weaver having been appointed as sole receiver in their place and stead. The complaint contained four causes of action, but two of these, namely, the third and fourth, were dismissed by the plaintiff prior to the trial below. The parties stipulated that the issues arising on the first and third causes of action should be tried before the court without the intervention of a jury, and a judgment entered according to the opinion of the court, "and that, if the opinion of the court is that the plaintiffs are not entitled to recover upon the first and third causes of action, then a trial shall be had to a jury, unless the parties agree to waive a jury, upon the issues joined on the second and fourth causes of action." On the trial of the first cause of action the lower court rendered a judgment in favor of the plaintiff below in the sum of $11,734.06. Subsequently, acting upon the aforesaid stipulation, there was a trial on the second cause of action before a jury, which resulted in a verdict and judgment in favor of the plaintiff below for the sum of $10,146.42. Two writs of error were sued out by

the defendant below, which were addressed, respectively, to the two judgments last mentioned. By the first count in the complaint the receiver sought to recover the value of water which had been supplied to the city by the irrigation company prior to the appointment of receivers, between January 1, 1897, and May 17, 1898. By the second count he sought to recover the value of water that had been furnished by the receivers after they assumed charge of the waterworks; that is to say, from May 17, 1898, until July 29, 1899, when the action was commenced. Concerning the pleadings in the case, it will suffice for present purposes to say that the receiver claimed that the city was liable to pay the sums claimed both in the first and second causes of action under and by virtue of the terms of a certain contract which was entered into by the city with one John R. Bothwell on August 6, 1889, which contract had been assigned by Bothwell on September 25, 1889, to the Bear Lake & River Waterworks & Irrigation Company, all of whose rights under said contract were acquired on or about September 1, 1894, at a foreclosure sale, by the irrigation company first above named, to wit, the Bear River Irrigation & Ogden Waterworks Company. The complaint showed that water had been supplied to the city by the irrigation company under the terms of said contract from the time it acquired the same, in September, 1894, until May 17, 1898, when receivers were appointed, and that thereafter water had been supplied by the receivers, and that the city had paid for the water so furnished at the contract rate until January 1, 1897, except a small amount ($90) which was due for the use of three hydrants from July 1, 1896, to January 1, 1897. The principal defense that was interposed by the city in its answer, and on which it seems to have relied exclusively as a justification for its refusal to pay for water that had actually been received, was that the contract which was made by the city with Bothwell on August 6, 1889, and under which water had been continuously supplied down to the institution of the suit, was in excess of the city's powers, and was for that reason invalid.

C. S. Varian (Herbert R. MacMillan, H. H. Henderson, and F. S. Richards, on the brief), for plaintiff in error.

Andrew Howat (Lindsay R. Rogers, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. It is further claimed in behalf of the city that the trial court erred in holding that the contract with Bothwell which was set out in the first cause of action was valid, and in sustaining a recovery thereon. Concerning this contention it is only necessary to repeat what has already been said,—that error cannot be assigned as respects the opinion of the trial court, which has found its way into the record, and that, if counsel expected to raise the question

respecting the validity of the contract, they should have stated their full objection to it when it was offered, and obtained a distinct ruling as respects its validity and admissibility. This was not done. The bill of exceptions shows that it was objected to when offered only on the ground that the execution of the contract was authorized by a resolution of the city council, rather than by an ordinance, and that it was "incompetent, irrelevant, and immaterial." The bill of exceptions does not show any distinct ruling as respects these objections, the statement being that it was received "subject to objection." But, even if the bill of exceptions did disclose a distinct ruling upon the first of the above objections, we should be of the opinion that it was untenable, inasmuch as the statutes of Utah did not in terms provide that such agreements as the one here involved should be executed in pursuance of an ordinance and not otherwise, and inasmuch as the contract appears to have been spread at large upon the records of the city, and to have been treated by it as valid for a period of years. Under such circumstances, the fact that the council approved the contract and authorized its execution by a resolution, and not by an ordinance, cannot be regarded as affecting its validity after this lapse of time. Board v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; Illinois Trust & Sav. Bank v. City of Arkansas City, 40 U. S. App. 257, 22 C. C. A. 171, 76 Fed. 271, 286, and cases there cited.

Lee *v.* City of Thief River Falls.

(*Supreme Court of Minnesota, Dec. 21, 1901.*)

[84 N. W. Rep. 654.]

Mandamus against City to Compel Payment of Judgment—Dismissal.—In mandamus proceedings to compel the city of Thief River Falls to pay a judgment recovered against the village under provisions of chapter 81, Gen. Laws 1897, *held*, that the legality of such reincorporation cannot be tested by mandamus, and that the petition was properly dismissed, it appearing that the judgment was recovered against the village after it ceased to exist.

(Syllabus by the Court.)

Appeal from district court, Red Lake county; William Watts, Judge.

Action by Henry W. Lee against the city of Thief River Falls. From an order denying petition for mandamus, plaintiff appeals. Affirmed.

Henry W. Lee, pro se.

Francis Hibner, for respondent.

LEWIS, J. Mandamus proceedings to compel the defendant to pay a judgment obtained by plaintiff against the village of Thief River Falls. The petition alleges that a judgment was recovered against the village on the 12th day of January, 1897, but it does not appear from the petition when the city, which succeeded the village, became incorporated. Defend-

ant's answer alleged that the village ceased to exist on the 4th day of November, 1896, more than one month prior to the commencement of the action which terminated in the judgment. For reply, plaintiff alleged that the proceedings taken to incorporate the city were void. At the hearing in the court below the court denied the peremptory writ, and dismissed the petition, for which order plaintiff appealed.

Plaintiff, in attempting to collect this judgment from the city, claims to be so authorized by the provisions of chapter 81, Gen. Laws 1897, which makes cities incorporated under chapter 8, Gen. Laws 1895, liable for the prior debts of the village. Conceding that plaintiff could enforce the payment of the judgment against the city by mandamus if the requisite facts were stated and existed, the pleadings in this case are fatally defective in the following respect: The allegation in the reply that the village was merged into the city November 4, 1896, is only denied by putting in issue the legality of such proceedings. Inasmuch as it appeared from the pleadings that the judgment was recovered against the village after the village went out of existence, the city would not be called upon to pay such a judgment. The question of the legal effect of the incorporation proceedings cannot be tested by mandamus. There is an adequate remedy at law to test the question whether plaintiff held a valid debt against the village. The petition was properly dismissed. Order affirmed.

Middleton et al. *v.* City of St. Augustine et al.

(*Supreme Court of Florida, Nov. 3, 1901.*)

[29 So. Rep. 421.]

Electric Light Bonds—Power of Legislature to Authorize Issue.—Under the provisions of section 8 of article 8 of the Florida constitution of 1885, the legislature has the power to authorize municipal corporations, through their properly constituted corporate authorities, to erect and own electric light plants for supplying light to their citizens or inhabitants, and to issue and sell bonds for such purpose, either with or without the sanction of their individual citizens or taxpayers, as expressed through an election.

Curative Statutes—Constitutionality.—The rule in respect to statutes curing defects in legal proceedings, where they amount to mere irregularities, not extending to matters of jurisdiction, and in the absence of constitutional limitations, is that "if the thing wanting, or which failed to be done, and which constitutes the defects in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

Same—Not Affected by Suit Instituted Previous to Its Enactment.—The force or validity of a curative act, enacted subsequently to the institution of a suit based upon the defects and irregularities intended to be cured by such act, but prior to judgment in such suit, is not affected by such suit.

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Cities and Towns—When Special Legislation Concerning May Be Enacted.—Special or local legislation, affecting cities and towns under section 8 of article 8 of the constitution of 1885, is not controlled by the proviso to section 21 of article 3, but may be enacted at any session of the legislature, and without the notice required by such proviso.

City Bonds—Issue Not in Accord with Authority Conferred May Be Restrained.—Where the legislative authority to a municipality, and the municipal ordinance passed in pursuance thereof, to issue city bonds, confines the place of payment of the interest coupons of such bonds to a specific place, it is a material variance and departure from the authority conferred to issue bonds providing for the payment of their interest coupons at any other place than the one so specified, and in such a case it is proper to restrain the issue so proposed.

(Syllabus by the Court.)

Appeal from circuit court, St. Johns county; Rhydon M. Call, Judge.

Bill by William C. Middleton and others against the city of St. Augustine and others. Demurrer to the bill sustained, and plaintiffs appeal. Reversed.

Bisbee & Bedell and W. W. Dewhurst, for appellants.

D. U. Fletcher and H. B. Philips, for appellees.

PER CURIAM. The appeal is from the order of the court sustaining the demurrer to the amended and supplemental bills. The action of the city of St. Augustine in the matter of establishing an electric light plant in said city, and the issuance of bonds in payment therefor, was based upon the powers conferred upon said city by its charter, being chapter 4636, Laws Fla., enacted in 1897. Besides these specific charter powers, the power was conferred generally upon all cities and towns within the state to construct and own electric light plants, and to issue bonds in payment therefor, by the provisions of chapter 4600, Laws 1897; but it is not contended for the city of St. Augustine that the provisions of this latter act were invoked in the steps taken to establish its electric light plant, but, on the contrary, that it acted under the provisions of its own special charter powers. These special charter provisions that are set forth in the statement accompanying this opinion were amply sufficient to invest the municipality of St. Augustine with power to erect an electric light plant, and to raise the funds therefor by bonds of the city. Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla. 229, 18 South. 677, 30 L. R. A. 540.

The bill to enjoin the issuance of the bonds proposed by the city questions the legality of both the ordinance alleged to have been passed by the city council on March 9, 1899, and the election held thereunder on the 28th day of the same month, on various grounds, as shown by the foregoing statement. After the passage of the said ordinance and the holding of the said election thereunder, the legislature of Florida enacted the curative statute (chapter 4866) approved May 11, 1899, set out in full in the statement above.

Under the provisions of section 8 of article 8 of the Florida

constitution of 1885, the legislature had the power, in the first instance, to authorize the municipal corporation of St. Augustine, through its properly constituted corporate authorities, to erect and own an electric light plant for supplying light to its citizens or inhabitants, and to issue bonds for such purpose, either with or without the sanction of its individual citizens or taxpayers as expressed in an election. In respect to statutes curing defects in legal proceedings, where they amount to mere irregularities, not extending to matters of jurisdiction, and in the absence of constitutional limitations, Judge Cooley, in his work on Constitutional Limitations (page 457), states the rule as follows: "If the thing wanting, or which failed to be done, and which constitutes the defects in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." The rule, as here expressed, has been established by the great weight of judicial decisions in America. The curative act (chapter 4866, Laws 1899), as expressed in its title, has undertaken to legalize the municipal election held March 28, 1899, and to validate the said city ordinance under which it was held, and to authorize the issue of bonds as therein provided. By the first section of this act the said city ordinance and the said election were legalized, and declared to be valid and binding in every respect. By the second section of said act the city of St. Augustine was authorized to proceed with the issuance of bonds to the amount of $20,000, as provided in and by said ordinance, and in manner and form and in accordance with such ordinances thereafter passed, not in conflict with the validated ordinance; and it was declared that the bonds of said city issued in pursuance of said validated ordinance, and of such ordinance or ordinances as may be passed in connection therewith, were valid in manner, form, and effect as issued, and to be binding and have full force, virtue, and effect in law and equity against the city of St. Augustine; and it was therein declared that the fact that the proposed bonds were to be payable in gold of standard weight and fineness should not affect their validity. Section 3 of said curative act declares that said act should be construed to be remedial and curative of any defects or want of power on the part of said city to pass said ordinance, and to hold said election, and to conduct the same in the manner the same was held and conducted, and to declare the result, and to arrive at such results through those voters who voted at said election; and the legalization of said ordinance and of said election and the issuance of said bonds in pursuance of said ordinance was affirmed as far as the constitution of the

state permitted and the legislature had power to enact. This curative act, in so far as it could do so, supplied and cured all irregularities and defects in the passage and adoption of the city ordinance, and in the calling, holding, and conduct of the election had in pursuance thereof, and authorized the city of St. Augustine to proceed with the issuance of the bonds in accordance with the provisions of that ordinance, or subsequent ordinances not in conflict with it; but it did not undertake to impose it as a compulsory duty upon such city to issue said bonds. In so far as the curative act is concerned, the discretionary power of the city through its proper corporate authorities to issue said bonds or not, as it pleases, was and is not taken away, but is expressly recognized, and not abridged. This legislative act which the city now invokes must be sustained unless it conflicts with some constitutional limitation. It is contended by counsel for the appellants that it was not competent for the legislature to pass the curative act in question under the provisions of section 5 of article 9 of our present constitution, which provides that "the legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes, and for no other purposes. * * * But the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits." It is argued that this provision of our constitution is similar to that in the constitution of Illinois, and that the construction there put upon it in the case of Marshall v. Silliman, 61 Ill. 218, and in other decisions cited from the same state, denies to the legislature the right to validate a void subscription and election for bonds, and to direct their issuance, upon the ground that it would be compelling the municipality to incur a debt for purely a local municipal purpose. The provision in the Illinois constitution thus construed is that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes" (Const. 1848, art. 9, § 5), and it seems to be held in that state that under it the legislature cannot compel a municipal corporation to incur a debt for a purely local municipal purpose. We do not construe the curative act herein involved as imposing upon the municipality of St. Augustine the compulsory duty of issuing the bonds provided for in the validated ordinance, nor does it attempt to validate any bonds already issued, and hence it is unnecessary to either approve or disapprove the Illinois cases cited, or to determine whether or not the legislature can compulsorily require a municipality here to contract a debt for a purely local municipal purpose, without its consent, or to validate bonds already issued illegally by it. The bill assails the city ordinance, the mode and manner of its adoption, the election held thereunder, and the sufficiency of the notice given of the holding thereof, and the qualifica-

tion of the persons who voted thereat, and the form of the bonds proposed by said ordinance in many particulars that it is unnecessary to repeat here. Many of these assaults may be within themselves unfounded or insufficient, independently of the curative act, to defeat the issue of the bonds sought to be estopped, but in no respect or particular is there any defect or irregularity pointed out or alleged against either the city ordinance or the bonds proposed that it was not within the power of the legislature to cure and validate by subsequent legislation, as it has done. In so far as the alleged defects and irregularities in the election held and as to the qualification of the voters thereat are concerned, it is a complete answer to say that the legislature had the power to authorize the municipality to issue the bonds in question without any submission at all of the question to an election by the taxpayers of the city; and, consequently, under the rule stated, it had the power by the subsequent curative act to declare that such election as was in fact held was a sufficient predicate for the proper issuance thereof, even though such election may have been irregular and defective,—which fact we do not determine.

The contention that the ordinance illegally confines the furnishing of electric light only to citizens of the city we think is untenable. It is true that in this connection the ordinance uses the word "citizens," but we think that it is used therein in its popular sense, including all residents and inhabitants, whether they be technically citizens of the city or not.

It is contended that the ordinance illegally delegates to the board of bond trustees of the city, who are neither officers of the city de jure nor de facto, powers and duties exclusively appertaining to the city council; but it is not contended that there does not exist an agency of the city known as such board of bond trustees. The constituent members of such board are made parties to the bills herein. The powers conferred upon this board to receive and countersign the bonds when issued, and to sell the same, and to receive the proceeds thereof, are of a purely ministerial or administrative character, and are properly conferred upon them, as held in the case of City of Tampa v. Salomonson, 35 Fla. 446, 17 South. 518; and, even though it should be conceded that the further powers conferred by the ordinance upon this board to exclusively control the erection of the electric light plant, and to expend the proceeds of the bonds therefor, and to operate the plant when erected, are invalid, yet such invalid feature of the ordinance will not affect the other valid features thereof, or of the curative act, nor defeat the proper issuance and sale of the bonds, since all of those powers can be exercised only after the bonds are issued and sold. City of Tampa v. Salomonson, supra. The fact that the curative act of the legislature was enacted subsequently to the institution of this suit, but before judgment therein, does not affect the force or

validity of such act. Cooley, Const. Lim. (6th Ed.) 468, 469; Vaughan v. Swayzie, 56 Miss. 704; Sidway v. Lawson, 58 Ark. 117, 23 S. W. 648.

The further contention that the curative act is a special or local law, and is unconstitutional, because enacted without the giving of the 60-days prior. notice provided for in section 21 of article 3 of the constitution of 1885, is untenable, as held in the case of State v. Commissioners of Duval Co., 23 Fla. 483, 3 South. 193. A careful reading of the curative act will show that the city was authorized thereby to issue the bonds only as were provided for in and by the city ordinance adopted March 9, 1899, and such subsequent ordinances as were not in conflict therewith. The said ordinance of March 9, 1899, expressly provides for the issuance of bonds whose interest installments were to be payable only at the city of St. Augustine. It appears, however, from the allegations of an amended supplemental bill herein, that the bonds actually proposed to be issued and sold provide, contrary to the provisions of the ordinance of March 9, 1899, that the interest installments or coupons thereof shall be payable either at St. Augustine or in the city of New York. There is no authority, either by the said city ordinance or by the said curative act of the legislature, for the city to issue any bonds the installments of interest on which can be made payable in New York or at any other place than at the city of St. Augustine, and to issue bonds so constructed would be a material variance and departure from the authority conferred. 1 Daniel, Neg. Inst. § 648 et seq. In this particular respect, and inasmuch as the said bonds are still within the city's control, the bill should have been sustained, and the city restrained from selling any bonds that provided New York or any other point than the city of St. Augustine as the place for the payment of their interest installments or coupons.

The decree of the court below is reversed, with directions for such further proceedings as shall be consistent herewith.

City of Denver et al. *v.* Hayes et al.

(*Supreme Court of Colorado, Dec. 3, 1901.*)

[63 Pac. Rep. 311.]

Incurring Municipal Debts—Submission to Election—Separate Propositions.—Under Const. art. 11, § 8, and Sess. Laws 1893, p. 200, § 9, and Sess. Laws 1899, pp. 371, 372, requiring the question of incurring a municipal debt to be submitted to the qualified electors, and enumerating eleven purposes for which the city council may issue bonds, an election is invalid which submits more than one proposition in such a manner that the elector must vote for or against them as a whole.

Municipal Bonds—Recovery of Deposit Made by Bidders—Interest.—Where bidders for a municipal bond issue make a deposit as guaranty of good faith, but afterwards sue to recover it because of the invalidity of the bonds, they are not entitled to interest.

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Appeal from district court, Arapahoe county.

Action by William J. Hayes and others against the city of Denver and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. M. Ellis, City Atty., Guy Le Roy Stevick, Asst. City Atty., S. L. Carpenter, Asst. City Atty., and N. B. Bachtell, Asst. City Atty. (Fred. A. Williams, George F. Dunklee, and James H. Brown, of counsel), for appellants.

Bicksler, McLean & Bennett and Thomas W. Heatley, for appellees.

CAMPBELL, C. J. Not a single authority has been cited by the city attorney in support of the construction which we are asked to sanction, but he says that there are no similar constitutional and statutory provisions in other states on which a decision might be expected. This may be true, but there are several decisions which we consider, in principle, to be squarely against his contention. He cites, however, the case of Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665, as authority for the proposition that an ordinance which authorizes the purchase or construction of waterworks is not void on account of including two subjects. But the court there expressly ruled that the one subject and one object of the ordinance under consideration was to secure for the city the ownership of its own waterworks. "It authorizes the purchase or construction, not the purchase and construction." This language impliedly recognizes the rule that, if there had been more than one purpose included, the ordinance would be void. Whether the distinction made is sound we do not say. But nothing in that case decided is against the conclusion which we have reached, but, if there is, it must give way to the ruling here. The following, among other, cases are in harmony with our resolution of the question under consideration. Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374, 49 N. E. 335; Truelsen v. City of Duluth, 61 Minn. 48, 63 N. W. 714; Metcalfe v. City of Seattle, 1 Wash. St. 297, 25 Pac. 1010; Petros v. City of Vancouver, 13 Wash. 423, 43 Pac. 361; Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 338, 372; Gray v. Mount, 45 Iowa, 591.

The cross error assigned by appellees, that the trial court was wrong in refusing to allow interest on the deposit from the date of the demand on the city to return it, is resolved against them. This is not a case for the award of interest. The judgment of the district court being in accordance with our conclusion, it is affirmed.

McHugh *v.* City and County of San Francisco et al.

(*Supreme Court of California, April 13, 1901.*)

[64 Pac. Rep. 570.]

Public Improvements—Public Act Superseded by City Charter.—Since the San Francisco city charter provides a complete scheme for

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the acquisition of "permanent municipal buildings and improvements," which include school houses, sewers, etc., by bonded indebtedness, the public improvement act, relating to the construction of such improvements in the same manner, is superseded by the charter, being inconsistent with the latter; and hence bonds issued for such purposes cannot be issued under such act, but must be issued under the charter.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Felix McHugh against the city and county of San Francisco and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Wm. T. Baggett, Charles E. Naylor, and Arthur H. Barendt, for appellant.

Franklin K. Lane, for respondents.

PER CURIAM. This case in all essential particulars is the same as Fritz v. City and County of San Francisco (S. F. No. 2,377) 64 Pac. 566, this day decided. By the facts disclosed upon this appeal, there is no question whatever but that the bonded indebtedness is to be created for the purpose of acquiring "permanent municipal buildings and improvements." School houses, sewers, etc., come directly within that classification. This being so, the act termed the "Public Improvement Act" is inconsistent with the provisions of the charter; for by the charter provisions a complete scheme for the acquisition of this character of municipal improvements by the creation of a bonded indebtedness is provided. For this reason the improvement act is superseded by the charter, and, being superseded, it stands as to the municipality exactly the same as if it were repealed. No bonds can be issued under its provisions, for as a law it is dead to the city. The bonds, therefore, if they may be issued at all, must be issued under the provisions of the charter. Yet bonds cannot be issued under the provisions of the charter unless their issuance has been authorized by the provisions of the charter. While the notice of election in this case appears to have been in a similar form to that laid down in the charter, yet the other objections suggested to the proposed issuance of these bonds are fatal. For these reasons, and upon the authority of the decision in Fritz v. City and County of San Francisco, supra, the judgment in this case is reversed, and the cause remanded.

TEMPLE, J. I concur in the judgment.

Broadfoot *v.* City of Fayetteville.

(*Supreme Court of North Carolina, June 7, 1901.*)

[39 S. E. Rep. 20.]

Constitutional Law —Municipal Bonds—Interest.—Const. art. 7, § 7, provides that no municipal corporation shall contract any debt, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein. Laws 1874–75, c. 248, enabled the town authorities to fund the then bonded indebtedness of the town,

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and to execute and deliver new bonds for like amounts in payment of the outstanding bonds, with interest not to exceed 8 per cent., the outstanding bonds having been issued under Laws 1852, c. 207, and carried interest at 6 per cent. The town, acting under Laws 1875 issued bonds to plaintiff with interest at 7 per cent., but no election was held on the question of authorizing the issue of the bonds: *held*, that that part of the act increasing the rate of interest was contrary to the constitution, and hence the whole interest would fail.

Appeal from superior court, Cumberland county; Moore, Judge.

Action by C. W. Broadfoot against the city of Fayetteville to recover a debt represented by certain bonds of the town of Fayetteville. From a judgment in favor of plaintiff for the amount of the bonds and interest at the rate of 7 per cent., both parties appeal. Modified.

Geo. M. Rose and Hinsdale & Lawrence, for plaintiff.

Busbee & Busbee and D. T. Oates, for defendant.

Defendant's Appeal.

MONTGOMERY, J. In the case before us the interest was provided for in the face of the bonds. It was a part of the debt, but to be distinguished still from the principal of the debt. That part of the act of 1874-75, c. 248, as to the principal amount of the bonds, was not contrary to the requirement of article 7, § 7, of the constitution. The general assembly, however, undertook to give the town authorities of Fayetteville the power to increase the rate of interest from 6 per cent. to as much as 8 per cent., in their discretion. That much of the act—the power to increase the rate of interest—was repugnant to the feature of the constitution which we have cited. A part of an act of the general assembly can be constitutional and a part unconstitutional. McCless v. Meekins, 117 N. C. 34, 23 S. E. 99. What, then, is the effect of the unconstitutional part of the act? Does the whole interest fail, or only the difference between 6 per cent., the amount provided for in the original bond, and the 7 per cent., allowed in the new bonds? We think the whole interest fails, for the one and simple reason that, as the rate agreed on was, in its effect, contrary to the provision of the constitution which we have pointed out, we cannot, by judicial decree, fix upon either 6 per cent. or any other rate. We cannot make a contract for the parties. That part of the judgment below is erroneous in so far as 6 per cent. interest is allowed upon the bonds, as only the principal sum of the bonds can be collected, with interest from the time of the maturity of the bonds. The judgment below is modified as in this opinion set out, and affirmed except as to the modification. Modified and affirmed.

Plaintiff's Appeal.

MONTGOMERY, J. There was no error against the plaintiff in the ruling and judgment of the court below. No error.

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Keller *v.* City of Scranton et al.

(Supreme Court of Pennsylvania, July 17, 1901.)

[49 Atl. Rep. 781.]

Municipal Indebtedness—Constitutional Restriction Applicable to Unliquidated Damages Assumed by City.—A contract by a city for the building of a viaduct without expense to itself, but by which it assumes the damages to abutting property, is within Const. art. 9, § 8, providing that a city shall not incur any debt, or increase its indebtedness to exceed 2 per cent. of the assessed value of property therein, without the consent of the electors.

Appeal from court of common pleas, Lackawanna county.

Suit by Luther Keller against the city of Scranton and others for injunction. Decree for defendants. Plaintiff appeals. Reversed.

I. H. Burns and Streeter & Lowry, for appellant.

A. A. Vosburg, Joseph S. Clark, and Willard, Warren & Knapp, for appellees.

MITCHELL, J. It is true that the constitution does not exempt municipalities, how great soever their indebtedness, from liability for wrongful and tortious acts. But it does not authorize the voluntary assumption of obligation to pay money by the scheme of a tort. The distinction between real or unpremeditated torts, and voluntary acts, under the technical name of "torts," done by agreement for the accomplishment of a purpose prohibited to be done by contract, is clear and substantial. And that is what we have here. The taking or injury to land by eminent domain is not a tort, in the sense of a wrongful act. When the broad distinction of actions into those ex contractu and those ex delicto was established, damages from the exercise of eminent domain were unknown. When they came into existence they did not strictly fit into either class, but, as they were certainly not founded on express contract with the landowner, they were put in the only other class, as torts. But when, as in the present case, the act which is called a "tort" is done under a contract, and the assumption of the consequent damages is an express term of such contract, we have a perfectly clear case outside of the principle that makes municipalities liable for their wrongful acts, without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration in the present. We are therefore obliged to hold that the ordinance in question is void, as increasing the indebtedness of the city of Scranton beyond its constitutional limits. The other objections to the ordinance are not sustained.

Town of Winneconne *v.* Village of Winneconne.

(Supreme Court of Wisconsin, June 20, 1901.)

[86 N. W. Rep. 589.]

Unconstitutionality of Incorporating Statute—Plea in Abatement—Effect of Curative Act.—Where a suit was instituted against a munici-

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pal corporation, and defendant pleaded in abatement the nonexistence of the corporation, because the statute under which defendant had attempted to incorporate had been declared unconstitutional, the fact that a curative act had been passed before trial did not render the plea ineffective.

Same—Same—Same—Failure to Serve Process after Passage of Curative Act.—A village was sued and served as an alleged corporation, and pleaded in abatement the nonexistence of the corporation, because the statute under which the village had attempted to organize had been declared unconstitutional, and after the passage of a curative act the case went to trial without service of process on the village created by the curative statute: *held*, that the action was properly dismissed, since the present legally existing village was never brought into court.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by the town of Winneconne against the village of Winneconne. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

This action was commenced July 9, 1894, by the plaintiff to recover of the defendant village certain liquor license moneys collected by the village during the years 1891, 1892, and 1893. The complaint alleged the corporate character of the town; that the defendant was a village duly incorporated, under chapter 40, Rev. St. 1878, and lying wholly within the limits of the plaintiff town, and had not at any time provided by ordinance for the support of the poor of said village, and that it had at no time a population exceeding 1,400; that the defendant had attempted to issue licenses to saloon keepers and pharmacists for the sale of spirituous and malt liquors during the years 1891, 1892, and 1893, and had received as license moneys upon such licenses a sum aggregating $2,796, and had expended of such money only the sum of $977.34 for the relief of the poor, and had used the balance thereof for other purposes; that the town system for the support of the poor was in force during all said time in the county of Winnebago and the town of Winneconne; and that no part of said moneys has ever been paid to the county. The complaint further alleged demand, and the proper filing of the claim and its disallowance. The answer pleaded in abatement that the defendant was never a duly-incorporated village; that an attempt was made to incorporate the defendant as a village in the year 1887, under the Revised Statutes of 1878, but that the law under which such attempt was made was unconstitutional, and hence that such proceedings were void, and that the defendant never became incorporated. The facts were stipulated, and the case was submitted upon such stipulation in November, 1899, and findings were made at that time by the court to the effect that defendant was formally incorporated June 3, 1887, under the general law then existing for the organization of villages, and that said law was unconstitutional, and hence that no such village as the village of Winneconne had ever existed. On these findings the complaint was dismissed, without costs, and the plaintiff appeals.

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Barbers & Beglinger, for appellant.
Bouck & Hilton, for respondent.

WINSLOW, J. (after stating the facts). Had the village of Winneconne been duly incorporated in 1887, no contention is made but that, under the facts stated, it would have been liable to the town in this action for the license money which had not been actually used in the support of the poor. Sanb. & B. Ann. St. § 1562. The complaint was dismissed, however, on the ground that at the time of the institution of the suit, and at the time the plea in abatement was made, there existed no such thing, either de facto or de jure, as the village of Winneconne, because the law under which it was attempted to be incorporated was unconstitutional. In re Incorporation of Village of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638. Leaving out of consideration for the moment the question of the effect of the supposed curative act of 1897 (chapter 5, Laws 1897), this position seems to be unassailable because there was not even a de facto corporation. This court has held that there can be no de facto corporation where there is no law authorizing the formation of a de jure corporation. Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342; Gilkey v. Town of How, 105 Wis. 41, 81 N. W. 120. The appellant, however, contends that a plea in abatement, in order to be effective, must be true at the time of the trial of the action (citing Winner v. Kuehn, 97 Wis. 397, 72 N. W. 227); and that at the time of the trial the village of Winneconne had become a legal corporation by virtue of the provision of chapter 5 of the Laws of 1897; hence that the plea should have been overruled. It is unnecessary in the present case to consider the legal effect of the last-named act. It will be considered and decided in the case which immediately follows this. 86 N. W. 590. Conceding to it all the force that can be claimed for it as a curative statute, we do not see how it can save the plaintiff in the present case. The general principle undoubtedly is that, if a plea in abatement is shown to be true when pleading is made, the plea is effective, and the plaintiff must seek a better writ. This court and some other courts have allowed an exception to this general rule in case of a plea of former action pending by holding that, if a former action be discontinued before the trial of the second action, the plea will not be available. Winner v. Kuehn, supra. We are not aware, however, that this exception to the general rule had been extended to any other class of pleas in abatement, nor are we referred to any cases so holding.

Other considerations in the present case seem to lead inevitably to the same result. The plaintiff obtained service upon a supposed corporation which did not exist de facto or de jure, and such supposed corporation made answer alleging its nonexistence. No answer nor notice of appearance was ever made or served by the village of Winneconne after the passage of the supposed curative act. It is true the case was

tried after the passage of that act, and it is recited that the defendant appeared by its attorney, but this must, we think, be held to refer to the original supposed defendant, in the absence of anything showing that the village created by the curative act had voluntarily come into court and taken up the defense. Furthermore, the curative act does not purport to save actions pending, but only to validate causes of action. Upon the whole record, we are satisfied that the action was rightly dismissed, both because the plea in abatement was effective, and because the present legally existing village of Winneconne has never been brought into court. Judgment affirmed.

Town of Winneconne *v.* Village of Winneconne.

(Supreme Court of Wisconsin, June 20, 1901.)

[86 N. W. Rep. 590.]

Incorporation—Invalidity of Statute—Curative Act—Prior Causes of Action—Liability of City—Authority of Legislature to Impose Conditions.—Const. art. 11, § 3, provides that the legislature shall have plenary power to provide for the organization of cities and villages by general law. Laws 1897, c. 5, declares that all villages which attempted to incorporate under the provisions of Rev. St. 1878, c. 40, are declared to be and to have been duly incorporated, and that all causes of action existing against such villages are declared valid to the same extent as they would have been if the act of 1878 had been valid: *held*, that a village which attempted to incorporate under the act of 1878 was liable on a cause of action which accrued prior to 1897, since prior to that date there was no corporation, and the legislature had power, under the constitution, to impose conditions on the municipality at the time of its creation.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by the town of Winneconne against the village of Winneconne. From an order overruling a demurrer to the answer, plaintiff appeals. Reversed.

This action was commenced May 20, 1900, to recover certain license moneys alleged to have been collected by the village during the years 1894 and 1895, under the same circumstances, except as to the time, as are set forth in the action under the same title as above, which is decided herewith. 86 N. W. 589. The complaint in the present action, in addition to allegations substantially the same as those in the immediately preceding action, set forth at length the facts as to the attempted incorporation of the defendant village, and also pleaded the passage of chapter 5, and section 6 of chapter 287, of the Laws of 1897, as validating acts. The answer pleaded in abatement that the defendant was not an incorporated village when the moneys sued for were collected and the cause of action accrued. A general demurrer to this answer was overruled, and the plaintiff appeals.

Barbers & Beglinger, for appellant.

Bouck & Hilton, for respondent.

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WINSLOW, J. (after stating the facts). This case is a companion case to the case of Town of Winneconne v. Village of Winneconne (decided herewith) 86 N. W. 589; but, this action having been commenced after the passage of chapter 5 of the Laws of 1897, the only question presented by the demurrer is as to the effect of the act. So far as applicable to this case, the act in question provides that all villages theretofore attempted to be incorporated under the provisions of chapter 40 of the Revised Statutes of 1878 are declared to be and to have been duly incorporated, and to have all the powers, privileges, and immunities of duly-incorporated villages, and all duties, obligations, and liabilities assumed by any of said villages, and all causes of action existing against them, are declared valid and efficient to the same extent that the same would have been of force had their organizations been regular, and the acts under which they were organized valid. Doubtless there existed a legal number of supposed villages which had been organized under the law referred to in the act, and hence there can be no doubt but that the act itself, being an act applicable to a class, was, under very familiar principles, frequently stated by this court, a general law, because applicable to a class.

It may be at once admitted that the legislature could not validate the orders by which such villages as the one in question here were attempted to be incorporated, because there was no constitutional law authorizing such orders in existence, and the legislature cannot validate or ratify an act which it would not have previously authorized. Kimball v. Town of Rosendale, 42 Wis. 407, 24 Am. Rep. 421. And hence the language of the act, to the effect that the villages in question are deemed to have been duly incorporated, may be admitted to be ineffective, so far as it is retrospective, or purports to declare that the incorporation is to be deemed valid ab initio. But there is another consideration which seems decisive of the present case. The legislature has plenary power to provide for the organization of cities and villages by general law. Const. art. 11, § 3. It may, in the exercise of such power, attach such conditions or obligations to the grant of municipal powers and privileges as it sees fit, and may compel the recognition and assumption of obligations not binding in law, but which are just and equitable in their character. Mayor, etc., of City of Guthrie v. Territory, 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841. It is to be noted that this is not the case of an attempt by the legislature to compel existing municipal corporations to pay obligations and levy taxes against their will. State v. Tappan, 29 Wis. 664, 9 Am. Rep. 622. The law in question is a law which, in substance, creates municipal corporations where there were none before, and which, as a part of the act of creation, provides that they shall pay certain obligations supposed to have been duly incurred by the voluntary and unauthorized body to whose

property they succeed. The assumption of the obligations is simply a condition attached to their corporative existence. It is not necessary for us to enter into any discussion of the vexed question as to the power of the legislature to compel an existing municipal corporation to pay obligations not previously binding upon it. This question has received attention in Hasbrouck v. City of Milwaukee, 13 Wis. 42, 80 Am. Dec. 718, and State v. Tappan, supra. There was no corporation prior to the act. The legislature created one, and by the same act endowed it with the property and property rights of a pre-existing voluntary organization, and required it to pay the just debts and obligations of that organization. We can see no objection, from any point of view, to this legislation. It seems to us simply the exercise of the undoubted power of the legislature to create municipal corporations. It is quite analogous to the power, which is frequently exercised, of apportioning the property and liabilities of a vacated town among the towns to which its territory is attached (Knight v. Town of Ashland, 61 Wis. 233, 21 N. W. 65); or the power of apportioning the property and liabilities of an existing county upon the creation of a new county from a part of its territory (Land, Log & Lumber Co. v. Oneida Co., 83 Wis. 649, 53 N. W. 491). No vested rights have been interferred with. Corporations have been created by the legislature burdened with the payment of certain claims. That this act was within the power of the legislature we can entertain no doubt. Order reversed, and cause remanded, with directions to sustain the demurrer.

Pittsburg Testing Laboratory, Limited, *v.* Milwaukee Electric Ry. & Light Co. et al.

(Supreme Court of Wisconsin, June 20, 1901.)

[86 N. W. Rep. 592.]

Light and Power Company—Quasi Public Corporations—Enforcement of Mechanic's Lien against.—A lien may be enforced against the power house of an electric light and street-railway company furnishing light and power under a contract with a city and operating an electric railroad, when the contract can be fulfilled, and the public uses served, without the use of such power house.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by the Pittsburg Testing Laboratory, Limited, against the Milwaukee Electric Railway & Light Company, impleaded with others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Hoyt & Olwell, for appellant.

Miller, Noyes, Miller & Wahl, for respondents.

CASSODAY, C. J. In the case at bar it is admitted that the defendant was engaged in carrying out and completing its contract with the city by means of its plant and appliances "other than the new power house" in question. In other

words, it is admitted that the new power house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric light and power plant for the public purposes for which the defendant corporation was established. It follows from what has been said that the plaintiff is entitled to such lien. The order of the circuit court is reversed, and the cause is remanded, with directions to overrule the demurrer, and for further proceedings according to law.

BARDEEN, J., took no part.

Gaslight & Coke Co. of New Albany *v.* City of New Albany.
(*Supreme Court of Indiana, Jan. 8, 1901.*)
[59 N. E. Rep. 176.]

Gas Company—Ultra Vires Contract for Lighting Streets.—Under Acts 1883, p. 85 (Burns' Rev. St. 1894, § 4301), authorizing a city council to contract for the lighting of the city for such time, not exceeding 10 years, as may be agreed on, a contract for a longer period is wholly invalid, and cannot stand for a period of 10 years.

Appeal from circuit court, Clark county; Jacob Herter, Judge.

Action by the Gaslight & Coke Company of New Albany against the city of New Albany for damages resulting from the failure of the city to maintain certain lights according to a contract. From a judgment sustaining a demurrer to the complaint, the plaintiff appeals. Affirmed.

Henry M. Dowling, for appellant.

George H. Hester and M. Z. Stannard, for appellee.

HADLEY, J. "When a municipal council is authorized by statute to contract for a period not exceeding 10 years, its contract for 20 years or for an indefinite time cannot be sustained as a contract for 10 years, but is entirely void." Beach, Mod. Law Cont. § 1148. See, also, 3 Cook, Corp. (4th Ed.) § 927; Manhattan Trust Co. v. City of Dayton, 8 C. C. A. 140, 59 Fed. 327, 335; State v. Town of Harrison, 46 N. J. Law, 79, 85; City of Somerset v. Smith (Ky.) 49 S. W. 456. Our conclusion is that appellee's ordinance of March 19, 1888, so far as it was attempted thereby to contract with appellant for lighting the streets and other public places of the city for a term of 23 years, was in violation of the act of 1883, and was therefore ultra vires and void. This result leaves the appellant without a contract to support its complaint; hence the demurrer thereto was properly sustained. Judgment affirmed.

DOWLING, C. J., did not participate in this decision.

Abstracts

State ex rel. Wood *v.* Consumers' Gas Trust Co.

(*Supreme Court of Indiana, Nov. 1, 1901.*)

[61 N. E. Rep. 674.]

Gas Companies—Franchises—Refusal to Furnish Gas—Rights of Citizen.—A natural gas company, which a city has permitted to lay its mains in the street to furnish its citizens with gas, cannot refuse to furnish gas to a citizen in front of whose premises the pipes were laid, on the ground that there was an unavoidable deficiency in the amount of gas produced by it, and that if it furnished gas to such citizen it would inconvenience other patrons.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Mandamus by the state, on the relation of Ann E. Wood, against the Consumers' Gas Trust Company. From a judgment in defendant's favor, plaintiff appeals. Reversed.

F. W. Ballinger, John W. Kern, and Jospeh E. Bell, for appellant.

R. N. Lamb, W. H. H. Miller, John B. Elam, and S. D. Miller, for appellee.

HADLEY, J. The principal argument of appellee's counsel is that not having sufficient gas to supply its present customers, and having exhausted every available means for increasing its supply, it is therefore impossible for it to perform its public duty, and mandamus will not lie to compel an attempt to perform a duty impossible of performance. We concede in the fullest terms that mandamus will not lie to require an attempt to do a thing shown to be impossible. But this is not the question we have before us. The relatrix is not asking, nor the court commanding, that the company attempt to increase its supply of gas. The relatrix is only seeking to be permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it. There is in the request of the relatrix nothing unreasonable and nothing impossible of performance. The whole question comes to this: The appellee, under public grant for the dispensation of a public good, has taken possession of certain streets and alleys in Indianapolis for the distribution and sale of natural gas to those abutting on its lines. The relatrix, owning a lot abutting on one of appellee's lines, erected thereon a dwelling house, and, upon the faith of being permitted to use the gas, has piped her house, and constructed her heating apparatus of a form suitable only to the use of natural gas as a fuel, which will be worthless if natural gas is denied her. She has, in common with other abutters, been subjected to the inconvenience of having the street in front of her house dug up and had her property occupied with the company's pipes. She has made all necessary arrangements to receive the gas, has tendered appellee its usual charges, has offered to abide by its reasonable rules and regulations, and we perceive neither legal reason, nor natural justice, in denying her the rights

accorded to those of her neighbors who have contributed in the same way to appellee's enterprise.

The second paragraph of answer was insufficient, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the return to the alternative writ of mandate.

Wagner et al. *v.* City of St. Paul.

(*Supreme Court of Minnesota, Jan. 3, 1901.*)

[84 N. W. Rep. 734.]

Ejectment to Recover Real Estate from City—Res Judicata—Estoppel by Verdict.—It is *held* that a former judgment between the an cestor of the plaintiffs and the defendant is conclusive in favor of the plaintiffs upon the fact that they are the owners of the land for the recovery of which this action was brought.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Charles E. Otis, Judge.

Action by Susanna Wagner and others against the city of St. Paul. Verdict directed for plaintiffs, and defendant appeals from an order denying a new trial. Affirmed.

James E. Markham and Franklin H. Griggs, for appellant.

B. H. Schribes and W. H. Williams, for respondents.

START, C. J. Conceding, without so deciding, that the two actions are not strictly identical, and hence the matter is not res adjudicata, still the finding of fact and the judgment thereon in the former action operate as an estoppel by verdict against the defendant in this action upon the question of the title and right of possession of the plaintiffs to the land in controversy, and are conclusive against the defendant on that question.

The defendant made no claim upon the trial that it had acquired any right to the premises since the commencement of the former action, and the trial court correctly directed a verdict for the plaintiffs. Order affirmed.

St. Anna's Asylum *v.* City of New Orleans et al.

(*Supreme Court of Louisiana, Dec. 3, 1900.*)

[29 So. Rep. 117.]

Batture—Advancement of Landing Line—Possession by City.—The city of New Orleans has the legal right, when in possession for public uses of a portion of a batture directly upon the river, in front of which the river was forming a shoaling bed, to fill up this shoaling space up to deep water with earth, to protect the same outwardly by a bulkhead, to advance the landing line to the bulkhead, and use the space in the rear of the bulkhead as a quay or place of deposit for unloaded cargoes. This advancing of the landing line does not carry with it, necessarily, a right on the part of the owner of the batture just in the rear of this new work to take absolute possession of the same, as full owner.

Abstracts

Same—Same—Right of City to Grant Possession to Contractor for Term of Years in Consideration of Work Done.—Where the city, holding for public use batture property upon the Mississippi river, which has in front a shoaling bank, determines, for the convenience of commerce, to advance the landing line to reach deep water, it has the legal right to enter into an agreement with private individuals to do the work necessary for this purpose, and to receive as an equivalent for such work a right of reasonable temporary use of such extension and the batture just behind. The naked owner of the batture cannot disregard the agreement, and dispossess the parties holding possession under it, on the ground that such occupancy of the ground is a private occupancy.

Rights of Third Parties.—If the agreement should be illegally or improperly exclusive of public rights of others, the courts would be open for their redress.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by the St. Anna's Asylum against the city of New Orleans and others. Judgment for defendants, and plaintiff appeals. Reversed, and judgment of nonsuit entered.

Fenner, Henderson & Fenner, for appellant.

Samuel L. Gilmore, City Atty., and Walter B. Sommerville, Asst. City Atty., for appellee City of New Orleans.

Rice & Montgomery, for appellees Wood, Schneidau & Co.

William S. Benedict, for appellee F. B. Nunn.

Horace E. Upton and John R. Upton, for appellees W. G. Coyle & Co.

NICHOLLS, C. J. The evidence shows that the batture in question is in front of a portion of the city on the Mississippi river where for many years back there has been what is called a "forming bank"; that is, a bank gradually extending outward by reason of accretions, deposits thereto from the river. The process of extension is gradual, and it is shown that a portion of the deposit accumulated during the high water is washed out or disappears as the river recedes. It will be readily seen how this shoaling or shelving in front of the original bank would, in the port of a city, become a matter of inconvenience. In low water the landing of cargoes would have to be made, year by year, further and further away from the regular "landing line," while in high water the water would cover the land in front, and yet might not be sufficiently deep to admit of boats reaching the land. In view of this condition of things, and to meet it, it has been usual for the city either to assist the gradual operation of natural causes by filling up with earth, by artificial means, the space in front to the distance needed and to the height needed, and then moving forward the "landing line," and protecting it in front with a revetment or a bulkhead, or by building wooden wharves, extending forward over the shoal places. There can be no question that the city of New Orleans was legally authorized, in the interest of the public and of commerce, to either do this work itself, or to have it done for it by others at public expense. Article 863 of the Revised Civil Code

declares that "the corporations of cities, towns, and other places, may construct on the public places in the beds of rivers, and on their banks, all buildings and other works which may be necessary for public utility, for the mooring of vessels, and the discharge of their cargoes, within the limits of their respective limits." The evidence shows that the privileges conferred upon the parties named in the ordinances mentioned were not gratuities, but were granted for a consideration which we must presume was not in excess of the value of services rendered, of the precise character we have alluded to. They were not privileges of a permanent character, but were granted for a reasonably short time, at which they were to end. In Fleitas v. City of New Orleans, 51 La. Ann. 25, 24 South. 633, we said, "The legality of making use of private individuals or corporations as public agencies in the accomplishment of public purposes, through special contracts, has been frequently recognized by the courts of the different states, notably in the case of City of New Orleans v. Louisiana Const. Co., 140 U. S. 662, 11 Sup. Ct. 968, 35 L. Ed. 556, in respect to this very contract [the sugar-shed contract]." In making that statement we were merely reiterating what had already been said by this court in Brown v. Duplessis, 14 La. Ann. 843, 844; Kline v. Parish of Ascension, 33 La. Ann. 566; and Leonard's Heirs v. City of Baton Rouge, 39 La. Ann. 285, 4 South. 241. If the work done by the defendants in this case, other than the city of New Orleans, had been done for and in consideration of a sum of money, and the property, the right to whose possession is in controversy herein, had been taken possession of by the city, and thrown open as a place for the general unloading of coal boats and for the deposit of coal, as a public landing, we scarcely think the present action would have been brought. The right of the city to the continued occupancy of the property would, we think, have been recognized. The peculiar feature in the situation, which we think has given rise to the litigation, is the fact that the property has been fenced in from the front, and the different private parties and partnerships, defendants herein, have been using it and are still using it for their exclusive use, as a place for the deposit and sale of their coal. We do not think that fact controls the rights of parties, under the circumstances of this case. If it be true, in fact, that the privileges in question are special privileges illegally granted to these particular parties; if it be true that they have illegally fenced in the property, and that they should have removed in the past, and should be made to remove in the future, from the property, within a reasonable time after unloading, the coal which they deposit upon it,—those are issues which the plaintiff is not warranted, if the property be really not otherwise subject to private possession, in raising, simply in virtue of a right of ownership. Parties whose rights are specially and directly affected by these particular facts are the proper

ones to urge them. The plaintiff has not contributed a dollar towards the present improved condition of the property. It has made no offer to remunerate the private parties now occupying the premises for their outlays, but it seeks to avail itself of their expenditures without compensation. It has allowed the defendants to expend money since 1891 without objection, and, two years in advance of the period which they and the city have determined as that which would repay them for their services, it seeks to oust them from the property which they occupy under an agreement in the nature of a contract, if not a contract. If true it was that it was entitled to have had a preference over the defendants of taking possession of the property on the same terms and conditions under which the defendants were allowed to take it, it is sufficient to say that it made no offer to do so, or to obtain or to exercise such right. It makes no offer now, but seeks to obtain from the court a decree recognizing its right of full ownership and full possession. If the decree which it seeks should be granted to it, it would enter into full possession of the property, thoroughly untrammeled as to the uses which it would put it to. It could, at its own will, build residences or put up manufactories upon it, or employ it for any other purpose which it might think fit, and do away with it entirely as a coal landing. It may well be that, at the termination of the privileges granted to the defendant, plaintiff may be able to effect some arrangement itself with the city.

Wood *v.* City of Mobile.

(*Circuit Court of Appeals, Fifth Circuit, April 2, 1901.*)

[107 Fed. Rep. 846.]

Eminent Domain—Rights Acquired by Condemnation—Special Statute.—Under a legislative act expressly authorizing a city to condemn under the power of eminent domain, in the manner provided by law, "all outstanding interest of every kind, character, or description, whether the same be legal or equitable, not owned by said city," in certain waterworks, such condemnation, when properly made, vests the city with absolute title to the interests condemned, and not merely an easement, measured by the need of the city to use the property for public purposes; and the title will not revert for nonuser.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

See 99 Fed. 615.

D. P. Bestor and R. H. Clarke, for plaintiff in error.

B. B. Boone, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. As we understand this act, it provides that the manner and mode of proceeding, to wit, in regard to application, notice, hearing, assessment of damages, report of commissioners, appeals, effect of appeal, time within

which damages shall be paid, etc., shall be according to the general law of the state in regard to the appropriation of private property for public use; but with regard to the interest to be condemned it expressly provides for all that was condemned in this case. This seems to be the plain meaning of the act in question, and, if the contention of the plaintiff in error is sound, it is difficult to see that the act of December 10, 1898, was at all necessary, or had any purpose, because under the act of November 30, 1898, the city of Mobile was given power to maintain and operate systems of waterworks and sewerage, and therein to exercise the right of eminent domain in the manner provided by law.

As to the contention that part of the property of the old Stein waterworks has reverted to the original owner because of nonuser after condemnation, it may be admitted that the general rule is that when a corporation, in the exercise of eminent domain, acquires for a public purpose an easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes; and, when such public use is abandoned, the right to hold the land ceases, and the property reverts to its original owner. But the plaintiff in error in this case can take nothing under this admitted rule, for two reasons: First, under the statute of December 10, 1898, more than an easement was condemned, to wit, all the right, title, and interest, legal and equitable, on the basis of which full title it is supposed the owner was fully compensated, and the property thereupon became the absolute property of the corporation; second, because, in the agreed statement of facts in this case, it is expressly admitted that "the city of Mobile has used, and is still using, the whole of property and franchises acquired from the plaintiff in error to supply water to the citizens of Mobile, and that the said Mobile City Waterworks are now connected by iron pipes with the new waterworks system built by the city of Mobile under the act of the general assembly of Alabama, approved November 30, 1898." On the whole record we find no reversible error, and the judgment of the circuit court is affirmed.

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